

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, ET AL.,)	CASE NO: 2:13-CV-00193
)	
Plaintiffs,)	CIVIL
)	
vs.)	Corpus Christi, Texas
)	
RICK PERRY, ET AL.,)	Wednesday, March 5, 2014
)	
<u>Defendants.</u>)	(9:27 a.m. to 11:16 a.m.)

MOTION HEARING

BEFORE THE HONORABLE NELVA GONZALES RAMOS,
UNITED STATES DISTRICT JUDGE

Appearances:	See Next Page
Court Recorder:	Genay Rogan
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Corpus Christi, Texas; Wednesday, March 5, 2014; 9:27 a.m.

(Call to Order)

(Courtroom and Telephonic Appearances)

THE COURT: Court calls Cause Number 2:13-193,
Veasey, et al, versus Perry, et al.

We'll start with the plaintiffs, if, I guess, counsel
representing Veasey and LULAC plaintiffs -- go ahead.

MR. DUNN: Good morning, your Honor.

THE COURT: You're over here. You were there last
time.

MR. DUNN: Yes. I've somehow or another switched
around. My name is Chad Dunn. I'm -- here with me in the
courtroom is Armand Derfner, Teresa Guerra Snelson, and Neil
Baron. We also have Gerry Hebert and Emma Simpson on the
telephone.

THE COURT: Okay. You're going to be speaking today?

MR. DUNN: Yes, on -- principally, yes, Judge.

THE COURT: All right. Government, The United States
of America?

MR. FREEMAN: Good morning, your Honor.

THE COURT: Morning.

MR. FREEMAN: Dan Freeman on behalf of the United
States. With me in the courtroom are my colleagues, Anna
Baldwin and John Smith, and on the phone are a host of others.

THE COURT: Okay.

1 **MR. FREEMAN:** But I will be --

2 **THE COURT:** You'll be taking the lead?

3 **MR. FREEMAN:** -- speaking for the Government.

4 **THE COURT:** Mexican American Legislative Caucus,
5 Texas State Conference of NAACP Branches, and Texas House of
6 Representatives. Go ahead.

7 **MR. ROSENBERG:** Thank you, your Honor. Ezra
8 Rosenberg on behalf of MALC and the Texas State NAACP. With me
9 is my colleague, Daniel Covich, and also on the phone, I
10 believe, are a host of people from the Brennan Center Lawyers'
11 Committee. Thank you.

12 **THE COURT:** Okay.

13 **MR. ROSENBERG:** And I will be speaking.

14 **THE COURT:** All right. Plaintiff Ortiz?

15 **MR. GARZA:** Jose Garza for the plaintiffs Ortiz, et
16 al., your Honor.

17 **THE COURT:** Okay. Then, we have Texas League of
18 Young Voters Education Fund?

19 **MR. HAYGOOD:** Good morning, your Honor. Ryan
20 Haygood. I'm joined by my colleagues, Kelly Dunbar and Natasha
21 Korgaonkar.

22 **THE COURT:** Okay. The Texas Association of Hispanic
23 County Judges and County Commissioners?

24 **MR. RIOS:** Rolando Rios here for the Association, and
25 I believe we have a couple of attorneys on behalf of Hidalgo

1 County on the phone.

2 **THE COURT:** Okay. Is that all of the plaintiffs?
3 And, then, defendants.

4 **MR. SCOTT:** Your Honor, John Scott on behalf of the
5 State of Texas with Reed Clay and David Whitley. Mr. Clay will
6 be taking the --

7 (Interruption on phone)

8 **MR. SCOTT:** Mr. Clay will be taking a portion of the
9 argument, and Mr. Whitley will be taking something on the --
10 the later.

11 **THE COURT:** Okay. I'm assuming, then, the people by
12 phone are just going to be listening? Is that correct,
13 Counsel?

14 **MR. ROSENBERG:** That's correct.

15 **THE COURT:** Okay. So, Brandy, you have their names?

16 **THE CLERK:** Yes, your Honor. On the phone is
17 Mr. Hebert; I believe Mr. Brazil just spoke; Ms. Westfall with
18 some other counsel, but Ms. Westfall was the only one that
19 announced for them. And that's all that I had on the phone.

20 **THE COURT:** Okay. Anyone else present by phone?

21 **MR. AGRAHARKAR:** Yes. This is Vishal Agraharkar from
22 Brennan Center.

23 **THE COURT:** I'm sorry. Can you repeat that?

24 **MR. AGRAHARKAR:** Vishal Agraharkar from the Brennan
25 Center.

1 **THE COURT:** Okay. Anyone else?

2 **MS. ZAMORA:** Hi. This is Erandi Zamora with the
3 Lawyers' Committee for Civil Rights.

4 **THE COURT:** Anyone else?

5 **MR. SPEAKER:** Scott (indiscernible).

6 **MR. POSNER:** Mark -- Mark -- Mark Posner also with
7 the Lawyers' Committee.

8 **MR. HENRICHSON:** This is Preston Henrichson with
9 Hidalgo County.

10 **THE COURT:** Anyone else on the phone?

11 **MR. KEISTER:** This is Ronnie Keister with the
12 Attorney General's Office, Texas.

13 **MR. ALI:** This is Hasan Ali with the Texas League of
14 Young Voters.

15 **THE COURT:** Is that all?

16 **MR. BLEDSOE:** Gary Bledsoe with the NAACP.

17 **THE COURT:** Okay. I don't hear anyone else, so we're
18 going to proceed.

19 I'm not really sure how to address that, if we need
20 to get everyone on the phone, their name on -- you know, I
21 guess if they're going to speak, we'll need to get their names.
22 But, anyway, we may need to address that later.

23 There are various matters pending before the Court,
24 and one matter that was left hanging or that we were set to
25 address today was that on February 18th this Court entered an

1 agreed order and supplemental protective order that was in
2 response to the joint motion to enter a discovery order and
3 protective order that we had addressed at a hearing. And it's
4 my understanding that order didn't address all the issues that
5 were presented at that hearing. So, what's left? I know there
6 were some database issues that we were needing to address.

7 **MS. BALDWIN:** Your Honor, Anna Baldwin for the United
8 States. I'm happy to address where we are with respect to
9 database issues.

10 Since the Court entered the supplemental protective
11 order on February 18th, the parties have made a great deal of
12 progress on the database discovery issues. Essentially, once
13 the order was entered on the 18th, Texas turned over its
14 databases on the 19th to all parties. Since that time both
15 defendants and all plaintiffs have finalized their database
16 comparison search protocols, the so-called algorithms. And, as
17 a result of a number of discussions that the United States has
18 had with defendants, we've come to an agreement on the
19 essential data preparation steps that we need to have agreement
20 on so that the federal agencies will be able to run these
21 comparisons as part of one computational process.

22 **THE COURT:** Okay. Very good.

23 **MS. BALDWIN:** So, essentially, where we are right now
24 is that once we got the data from the State of Texas, we
25 prepared that data and did some standardization steps and have

1 gone ahead and distributed it to the federal agencies on
2 encrypted hard drives, and we are in the steps with them
3 talking about really operationalizing the process. At this
4 point, all plaintiffs have discussed some interim modifications
5 to the schedule that would need to be made to accommodate the
6 length of time that the database process will take, and none of
7 those date changes, proposed date changes, would affect the
8 September 2nd trial date. So, we've reached agreement among
9 the plaintiffs, and we've just this morning circulated a
10 proposal to defendants, and we hope to be getting back to the
11 Court in a few days with what we hope will be an agreed-upon
12 proposed amended scheduling order.

13 **THE COURT:** Okay. Anything from -- anything further
14 from the plaintiffs? It's my understanding there is an
15 agreement with all of the plaintiffs regarding that issue?

16 **MR. DERFNER:** Yes. Armand Derfner for the Veasey
17 plaintiffs, and we were -- we had raised some of the issues
18 that brought this issue to --

19 **THE COURT:** Uh-huh.

20 **MR. DERFNER:** -- before the Court. And what
21 Ms. Baldwin has said is basically correct, and I'm pleased to
22 say that it was the procedure the Court -- that the Court
23 followed that helped us get to this, to this point.

24 **THE COURT:** Okay. Well, I'm glad you all have been
25 able to work through that.

1 **MR. SCOTT:** Your Honor, nothing additional other than
2 we have not really reviewed anything on the proposed scheduling
3 order. We have not (indiscernible) yet, so --

4 **THE COURT:** Okay. So --

5 **MR. SCOTT:** (indiscernible)

6 **THE COURT:** -- you all are going to look at that, and
7 then, if there is an issue the Court needs to address, you'll
8 let me know.

9 **MR. SCOTT:** Yes, ma'am.

10 **THE COURT:** Otherwise, you all will submit an agreed
11 order?

12 **MR. SCOTT:** Yes, ma'am.

13 **MS. BALDWIN:** Yes, ma'am.

14 **THE COURT:** Okay. Anything else on that issue?

15 **(No audible response)**

16 Okay. Then -- and I know this is not ripe yet; I
17 probably should have shortened the response on this. But the
18 United States filed a motion for a protective order to limit
19 the extent of the defendant's request for production. Can we
20 address that? I know it's not ripe, but have you all talked
21 further on that, or is that a matter we can take up this
22 morning, at least to limit it some way?

23 **MS. BALDWIN:** Your Honor, I'm not prepared to argue
24 that motion. I could broadly describe what it's about.

25 **THE COURT:** I mean, it just seems fairly basic.

1 There are some definitions, I guess, that the Government is
2 saying are overbroad, causing some issues as to how they can
3 respond. And I can wait; I just thought if we could address
4 any outstanding matters, particularly discovery, that we
5 should. But if you're not ready, that's fine.

6 **MR. SCOTT:** Your Honor, we're in the middle of
7 preparing a response to them, and before we get that on file
8 with the Court we'll reach out to the folks at DOJ and
9 rehash --

10 **THE COURT:** Yeah.

11 **MR. SCOTT:** -- those issues --

12 **THE COURT:** I think you all should do that.

13 **MR. SCOTT:** -- to try and narrow it.

14 **THE COURT:** Because I think there is some common
15 ground here we could -- you all are probably at far sides on
16 this issue that -- you know, I think they have some legit
17 concerns just from what I read. Obviously, you haven't
18 responded. But it might be something that you all can come a
19 little closer on.

20 When might you get a response on file?

21 **MR. SCOTT:** We were operating under the -- just the
22 local rules, looking at that, but I think that we would be in a
23 position to reach out to them sooner than that --

24 **THE COURT:** Okay.

25 **MR. SCOTT:** -- probably early part of next week, be

1 able to reach back out to them and kind of probably better
2 articulate, perhaps, and even provide them a copy of what we
3 intend to put on filing on the response.

4 **THE COURT:** Okay. Then, that will remain pending.

5 And, then, the other issue, probably the last matter,
6 was the United States' motion to compel production of
7 legislative documents. That was filed; briefing's been done by
8 the defense and the other plaintiffs. So, I just want to ask a
9 couple of things before I let you argue that. But first, in
10 reading the briefing, I noticed that defendants said -- I'm
11 assuming you all conferred, because there was a notice that you
12 all had conferred regarding this matter, but I did see where
13 the defendants had said that they would agree to go contact the
14 legislators to see if they agreed, if they waived this
15 privilege, without me even deciding that. But, I mean, if
16 that, in fact, is so, why are you all -- why haven't we done
17 that, or has that been done?

18 **MR. SCOTT:** Your Honor --

19 **THE COURT:** Then I wouldn't have to address this.

20 **MR. SCOTT:** Well, we have actually reached out to the
21 251 legislators that the DOJ had sought discovery from, or at
22 least reduced the overall universe of materials that they were
23 seeking down to the 251 folks. And we have, in fact, provided
24 to DOJ a spreadsheet of the responses back from all of those
25 different legislators.

1 **THE COURT:** So, did they waive, or didn't waive, or
2 some did, some didn't?

3 **MR. SCOTT:** The latter.

4 **THE COURT:** Okay. How many? Do we know?

5 **MR. SCOTT:** I could count the sheet, but I did not
6 have a number ready for the Court on what the exact number is,
7 but I do have a spreadsheet.

8 **THE COURT:** Because there seemed to be an issue on
9 that number 250 also as to whether -- well, the defense said
10 some of them were no longer living --

11 **MR. SCOTT:** And that's two of them.

12 **THE COURT:** -- some were not involved in this, didn't
13 come on to be legislators until 2013; so --

14 **MR. SCOTT:** That's about 40 of them.

15 **MR. FREEMAN:** Your Honor, it's the position of the
16 United States that documents that were produced by e-mail by
17 legislators, even if they're no longer in the legislature, and,
18 unfortunately, even if they've passed, are still relevant to
19 the intent of SB 14. In addition, documents produced by
20 legislators who joined the legislature just last year may be
21 relevant to both the legislature's action or inaction in
22 response to the district court decision in D.C., as well as the
23 Supreme Court's decision in Shelby County, as well as the means
24 by which SB 14 is being implemented. And, so, we would argue
25 that those documents are relevant. And, in fact, just

1 yesterday a court in North Carolina found that similar
2 documents were relevant to a challenge to North Carolina's
3 voter I.D. bill.

4 **THE COURT:** Okay. I don't think there is any
5 question there is a privilege. I do believe it's qualified. I
6 think it's just figuring out what it covers and what it doesn't
7 cover. But one of the issues raised by the defendants is that
8 the plaintiffs haven't procedurally done this properly, that
9 the request should have gone to the legislators as nonparties,
10 I guess, through subpoenas. So, what's the Government's
11 position on that?

12 **MR. FREEMAN:** Your Honor, Texas is in possession of
13 thousands of documents that are set out in their privilege
14 logs. They conceded on page 33 of their initial disclosures
15 that they were in possession of those documents. And, so, the
16 United States believes that it should not be required to
17 subpoena third parties who may also be in possession, custody,
18 or control of those documents.

19 **THE COURT:** There's two issues, I guess. One, I
20 don't know that Texas can raise the privilege or assert the
21 privilege for those legislators, one. And two is whether they
22 can -- Texas can produce that if there's this privilege. But
23 I'm just getting a mix of things here from the defense: one,
24 we've already produced a bunch of documents in the D.C. case
25 regarding this; and, then, two, they're not in our possession,

1 custody, or control. So, what is it?

2 **MR. CLAY:** Well, I think there is a little bit of
3 confusion. There's kind of two sets of documents we're talking
4 about. The first is what defendant -- or plaintiffs' counsel
5 was just discussing, which were -- came into play during the
6 preclearance case up in D.C. Some of those documents are in
7 the possession of the Attorney General's office, who is also
8 not a party to this case, so the subpoena issue is still there.

9 There is also another set of documents that would be
10 responsive to their very, very expansive request. As we've
11 already discussed, they've asked for documents for people who
12 were not even at the -- in the legislature at the time the
13 preclearance case was proceeding. And, so, those sets of
14 documents are definitely not in anybody's custody or control
15 other than the legislators. And I think your Honor is correct
16 in pointing out that even those documents that are in the
17 custody of the Attorney General's office, the Texas Attorney
18 General's office, who is not a party to this case, are subject
19 to a host of privileges, one of which, of course, is
20 legislative privilege, and the exact contours of that is the
21 subject of this motion. And the other is the attorney-client
22 privilege, because the only reason those documents are in the
23 possession of the Texas Attorney General's office is in our
24 capacity as representing them during the discovery process in
25 the preclearance case in D.C.

1 **MR. FREEMAN:** Your Honor, if I could respond. If
2 documents were covered by the attorney-client privilege when
3 they were turned over to an attorney for purposes of discovery,
4 then no documents would ever be produced in litigation. Those
5 documents were not turned over for the purpose of obtaining
6 legal advice; they were turned over for the purposes of
7 complying with discovery. And, so, they're not covered by the
8 attorney-client privilege. It's -- also, the State of Texas
9 conceded in its initial disclosures that they were in
10 possession, custody, or control of those documents.

11 Moreover, it's the position of the United States that
12 the State of Texas must include the Office of the Attorney
13 General. Unlike when private plaintiffs bring suit, the United
14 States has sued the state in its entirety. And, so, that
15 includes the State of Texas, it includes state agencies such as
16 the Texas Legislative Council, who is in possession -- which is
17 in possession of the e-mail servers at issue that contain the
18 documents that the United States seeks. It's not general
19 practice that a party should have to seek third-party subpoenas
20 in order to obtain documents that are also in the possession of
21 a party to this case.

22 **THE COURT:** All right. So, it appears that quite a
23 few documents were produced in the D.C. case, correct?

24 **MR. CLAY:** Correct.

25 **THE COURT:** And, so, there is -- the United States is

1 wanting more than what that court ordered produced?

2 **MR. FREEMAN:** Yes, your Honor. The court in D.C.
3 limited the scope of production in order to limit the
4 federalism issues that it saw to be raised by Section 5 of the
5 Voting Rights Act and, specifically, the application of
6 Section 5 only to a limited universe of states. And, so, it
7 did apply a state legislative privilege in that case. The
8 United States believes that -- that no state legislative
9 privilege should shield the documents at issue from production
10 here for the reasons set out in our brief, and, so, the United
11 States seeks to compel the production of a broad scope of
12 documents that Texas withheld in the last litigation.

13 In addition, the United States seeks a new set of
14 searches largely because in the last litigation the State of
15 Texas had individual legislators pull their e-mail on sort of
16 the client's side through -- through their own computer, the
17 Microsoft Outlook, as opposed to the ordinary way that
18 documents are produced consistently across numerous e-mail
19 users in any litigation involving a large corporation, which is
20 to pull them from the server side with a uniform set of search
21 terms. In addition, a new search is necessary to update the
22 set of e-mails to include e-mails and other documents produced
23 after the last litigation. And, in addition --

24 **THE COURT:** But that's just updating --

25 **MR. FREEMAN:** Sorry.

1 **THE COURT:** -- which I'd suspect that's not a
2 problem; updating what you've already produced, correct?

3 **MR. CLAY:** Well, I don't think it's a simple matter
4 of updating because I --

5 **THE COURT:** Well, not everything. I'm just saying
6 what -- obviously, we're now -- however further along, how -- I
7 don't know when that order was issued by the D.C. court; I
8 don't know when the documents were produced. But there's going
9 to be some updating, I would think.

10 **MR. CLAY:** Well, there would be -- to the extent
11 that documents are responsive to their request for documents
12 that were created after the 2011 legislative session, there
13 would be -- there are more -- there are probably more documents
14 out there related to SB 14 created after that time. We
15 maintain that those documents have no bearing whatsoever on the
16 intent of the 2011 legislature enacting voter I.D. So, I mean,
17 the short answer is, yes, there is updating, but I'm not sure
18 there's documents that are at all relevant to the issues in
19 this case.

20 **THE COURT:** Okay. So, there is no agreement to
21 produce the category of documents you've already produced
22 simply just updating that category of documents.

23 **MR. CLAY:** Certainly not on the scale that they're
24 seeking.

25 **MR. FREEMAN:** And, your Honor, just to be clear, the

1 State of Texas produced no internal documents related to the
2 legislature in the last litigation. It's a huge scope of
3 relevant and potentially highly probative documents that the
4 United States seeks in this motion. Similar documents have
5 been relied upon by numerous courts hearing Voting Rights Act
6 cases, and two courts have found that the exact same
7 legislature that enacted SB 14 either likely intentionally
8 discriminated on account of race or did intentionally
9 discriminate, relying on just such documents or legislator
10 testimony.

11 **THE COURT:** But both of those courts found a
12 qualified privilege, correct? And they went through trying to
13 sort what would be -- what should be produced.

14 **MR. FREEMAN:** Well, the court in the Western District
15 of Texas required a full production but under seal. And --

16 **THE COURT:** But it found a qualified privilege --

17 **MR. FREEMAN:** It subsequently did find a qualified --

18 **THE COURT:** -- and personal qualified privilege.

19 **MR. FREEMAN:** Yes, your Honor.

20 **THE COURT:** And the other court did, too, the D.C.
21 court.

22 **MR. FREEMAN:** The D.C. court did not specifically
23 find a privilege because it said that any such privilege had
24 been waived in the *Perez* litigation and that that waiver would
25 apply in D.C. as well. But it did note that no such privilege

1 was found in Rule 501 or had been found by the D.C. Circuit.

2 **MR. CLAY:** I would just respond that in the District
3 of Columbia, in the redistricting case to which counsel refers,
4 the court gave short shrift to the legislative privilege only
5 noting that the D.C. Circuit had never recognized a legislative
6 privilege, ignoring the Supreme Court case law and various
7 other federal case law out there. And, obviously, you know,
8 we're in the Fifth Circuit, and even this Court has recognized
9 a qualified legislative privilege, at least in the context of a
10 1983 action.

11 Also, numerous cases that they cite in support of
12 their arguments to do away with or abrogate legislative
13 privilege in this case actually support the idea that
14 legislative privilege is a viable and applicable doctrine, even
15 in Section 2 cases, even in Fifteenth Amendment cases.

16 **THE COURT:** All right.

17 **MR. FREEMAN:** Your Honor --

18 **THE COURT:** I'm kind of -- go ahead. I'm going to
19 let you all argue, but I just needed to clear up a few things
20 before we proceeded.

21 **MR. FREEMAN:** Sure. I mean, just to respond to
22 counsel for the defendants, while it's true and the United
23 States has always stated that there are numerous courts that
24 have applied a qualified privilege, it's the United States'
25 position that *United States v Gillick* (phonetic) and *Jaffee v.*

1 *Redmond* establish that there is no -- that any comity interest
2 that might support a state legislative privilege simply is
3 overcome by an important federal interest, such as federal
4 criminal prosecutions. And that doctrine is not limited to
5 federal prosecutions and should certainly apply in an important
6 context such as this. And, as a result, the United States is
7 not aware of any case in which a court has declined to provide
8 documents to the United States when the United States has
9 brought a Section 2 case, and it is not aware of any case in
10 which a court has issued a blanket prohibition on production of
11 internal legislative documents even when there are private
12 plaintiffs who have brought the suit. The court has at least
13 required the production of some documents in all of the cases
14 of which the United States is aware.

15 **THE COURT:** And I think that's where the issue is;
16 what documents.

17 **MR. FREEMAN:** Well, your Honor, there are a few
18 different approaches that courts have taken. In some cases,
19 such as *Perez*, the court has required a full production under
20 seal. In other cases, such as *Favors v. Cuomo*, the court has
21 undergone an in-camera review. However, that in-camera review
22 is still ongoing after over a year. And, so, under this
23 Court's schedule, the United States believes that if this Court
24 only thinks that a subset of documents are relevant,
25 unfortunately, it's not really possible from defendant's

1 privilege logs to identify exactly which documents are the most
2 appropriate, as they're all relevant, and the privilege log
3 merely establishes that they are internal to the legislature.
4 And, so, likely the best procedure would be a production under
5 seal, as the -- as the Court carried out in *Perez*, and if the
6 parties want to introduce those documents in court, we could
7 subsequently discuss individual documents, and there would be
8 no negative effect on the legislature, as the documents would
9 be produced either subject to the protective order that's
10 already in place or under seal.

11 **MR. CLAY:** Well, I think all of this kind of gets to
12 the point of that we've put the cart before the horse here.
13 We're talking in broad strokes about a legislative privilege
14 and -- and about the amorphous contours of that privilege. But
15 we don't have -- if we had gone about this the correct way,
16 which is subpoenaing various legislators or the Attorney
17 General's office with respect to specific documents, we might
18 be in a better position to discuss the actual contours and
19 whether a particular document is or is not subject to a
20 privilege.

21 **THE COURT:** Okay. Well, let me just say; the ones
22 that have waived the privilege, I don't need to deal with them
23 at all. Correct?

24 **MR. CLAY:** That's correct.

25 **THE COURT:** They're going to provide whatever needs

1 to be provided.

2 **MR. CLAY:** It's their privilege, and if they waive
3 it, they waive it.

4 **THE COURT:** And how many are we talking about? I'm
5 trying to get a grasp as to the magnitude of this. And you can
6 look at that if you need some time.

7 **MR. CLAY:** He was supposed to be counting.

8 **(Laughter)**

9 **MR. FREEMAN:** Your Honor, none of the principal
10 sponsors of SB 14 nor the speaker nor the lieutenant governor
11 have waived.

12 **THE COURT:** Look, you requested a lot of documents.
13 I need to figure out where we are, how much I don't even have
14 to deal with at all, and that's what I'm trying to figure out.

15 **MR. FREEMAN:** Understood, your Honor.

16 **MR. SCOTT:** Your Honor, I only have one document,
17 which I believe is the same thing we've provided to the United
18 States. It's a 12-page spreadsheet of legislators who we have
19 received the representation letter. And, so, the Court --
20 whether we can infer the rest do not wish to assert their
21 privilege or not is another issue. We know the ones who have
22 affirmatively said: We want the State of Texas to protect our
23 legislative privilege.

24 **THE COURT:** And how many were those?

25 **MR. SCOTT:** I --

1 **THE COURT:** Oh. Okay.

2 **MR. SCOTT:** That gives you a quick glance of who they
3 are, specifically.

4 **THE COURT:** I'm just trying to figure out the number
5 here. So, all these want to assert the privilege.

6 **MR. SCOTT:** Yes, ma'am. Well, the ones that are
7 noted on that. That's the complete universe of the 251
8 representatives that were identified by the Department of
9 Justice that they wanted their records from them and their
10 staff for those four or five legislative periods.

11 **THE COURT:** Okay. But who -- how many have waived
12 the privilege? I thought that's what we said earlier, that you
13 all had checked with them to see if anyone would waive that
14 privilege, and that some did.

15 **MR. SCOTT:** We checked with them to find out if they
16 wished us to represent them on the issue of legislative
17 privilege. And we sent a letter out to each one of them and
18 said: If you want us to assert any privilege in this case,
19 then you need to notify us by a date certain. And --

20 **THE COURT:** And they haven't?

21 **MR. SCOTT:** -- those are the ones that have not
22 responded in there, have never responded to us.

23 **THE COURT:** Wait, wait, wait. I just need numbers.

24 **MR. SCOTT:** And, your Honor, I'll get them.
25 (indiscernible).

1 **THE COURT:** Okay. I have 250 people here. I don't
2 know by looking at this -- and my eyes get worse every day --
3 as to --

4 **MR. SCOTT:** I appreciate --

5 **THE COURT:** -- who has waived privilege and so that
6 we don't even talk about those people. They've waived the
7 privilege; the Government gets what they want or what they've
8 requested.

9 **MR. SCOTT:** And I want to make sure that I'm on the
10 same track with the Court. I don't think there was anything
11 about our letter that left those representatives or legislators
12 with the understanding that the failure to comply with -- or
13 failure to ask us to represent waived that privilege.

14 **THE COURT:** Okay. Let me just say this. I thought,
15 in reading the briefs, State of Texas said: We've agreed to
16 reach out to the legislators, see if anyone will waive the
17 privilege, and we'll let you know who's waived the privilege.

18 **MR. SCOTT:** We agreed to -- asked each of those
19 legislators to get back to us if they wanted us to represent
20 them on that privilege. And that's what we have, in fact,
21 done, and --

22 **THE COURT:** That's not the way I read your briefing.
23 And I don't know what page it was on at this point, but I
24 thought State of Texas said: We have agreed to contact the
25 legislators to see if they'll waive the privilege, and then

1 we'll let you know. Is that not what the deal was?

2 **MR. SCOTT:** I -- I wrote the letter, and, so, I -- I
3 think my intent was --

4 **THE COURT:** Okay.

5 **MR. SCOTT:** -- and, your Honor, if that was in the
6 brief, I apologize, because that's not the intent.

7 **THE COURT:** Okay. Well, let's go outside the briefs.

8 **MR. SCOTT:** Sure.

9 **THE COURT:** Isn't that the best way to handle this?

10 **MR. SCOTT:** I think that --

11 **THE COURT:** Does anybody waive? If you waive the
12 privilege, we don't have an issue for the Court to address at
13 least as to those people, and I don't have to maybe review a
14 bunch of documents regarding those people.

15 **MR. SCOTT:** I think, absolutely, your Honor's correct
16 in that. The question then gets to be the procedure that we
17 get to that point, because currently there are no documents
18 that would be relevant to that discussion, because there has
19 never been a request made to those specific legislators that
20 they produce a document. And, so, that's part of the problem
21 with --

22 **THE COURT:** Well, and that's where the *Perez* court
23 said this is premature.

24 **MR. SCOTT:** Yes.

25 **MR. FREEMAN:** Your Honor, to the extent that

1 defendants have produced thousands upon thousands of pages of
2 privilege logs, they've represented both that they possessed
3 those documents and that those documents were privileged, and
4 the United States has not received any of those documents
5 subject -- or subject to -- subsequent to a waiver by a Texas
6 state legislature -- legislator. It is our understanding that
7 all of the legislators whose claimed state legislative
8 privilege is at issue in those privilege logs continue to
9 maintain the privilege.

10 **THE COURT:** So, nobody has waived. Because I thought
11 in the *Perez* case someone said they went forward with
12 depositions and these legislators didn't claim the privilege.
13 Or is that not correct?

14 **MR. FREEMAN:** In the *Perez* case, yes, legislators
15 did --

16 **THE COURT:** So --

17 **MR. FREEMAN:** -- did waive.

18 **THE COURT:** -- if we push them a bit, may they waive
19 it? I mean, come on, guys. You know, this is a lot of stuff
20 to sort through and look through. Are they waiving it or not?

21 **MR. FREEMAN:** Your Honor, at least with regard to the
22 key sponsors and the speaker --

23 **THE COURT:** Is that all you wanted me to look at is
24 the key sponsors? I mean, here we have 250 legislators.

25 **MR. FREEMAN:** Unfortunately, due to the State of

1 Texas's deletion policy of their e-mails, we don't know who's
2 held on to e-mails. And that's part of the reason why we have
3 sought e-mails so broadly. But what we are certain is that the
4 vast bulk of documents that are in the logs are from those
5 individuals and that the individuals named in the privilege
6 logs, it's our understanding that they have not waived and that
7 the issue is (indiscernible).

8 **THE COURT:** Okay. I may be missing the big picture
9 here; but wouldn't it be very simple to start out with: Who's
10 waiving the privilege? We'd cut that category out. I don't
11 even need to deal with them.

12 **MR. FREEMAN:** Absolutely, your Honor. It's just the
13 understanding of the United States that few, if any, have
14 waived. We --

15 **THE COURT:** Well, I guess my problem is that you all
16 haven't even figured that out.

17 **MR. FREEMAN:** Well, your Honor, we've been
18 requesting --

19 **THE COURT:** You could be getting a bunch of documents
20 here that -- if they've waived the privilege.

21 **MR. FREEMAN:** Your Honor, we requested these
22 documents months ago, and there is -- we are running out of
23 time, unfortunately. And the State of Texas seems to have not
24 asked legislators if they wish to waive, but merely if they
25 wished to be represented with regard to state legislative

1 privilege. We believe that this issue is -- is ripe,
2 especially with regard to the documents and the privilege log,
3 and I believe that if you were to cross-reference the
4 legislators at issue in the log and those who have
5 affirmatively asserted a privilege or asked to be represented
6 by the State with regard to the privilege, you would be
7 covering a very large percentage of those privilege logs.

8 **THE COURT:** Okay. Well, and the other issue we've
9 briefly touched on is State of Texas is saying -- and I think
10 *Perez* court said also -- that this is a personal privilege to
11 those legislators and you need to request the information from
12 them.

13 **MR. FREEMAN:** Your Honor, the *Perez* court did not
14 specifically say that we needed to request the information from
15 them; it merely said that the privilege itself is personal.
16 There could, theoretically, be a personal privilege over a
17 document that is, nonetheless, in the possession of the State
18 of Texas, and --

19 **THE COURT:** And, so, you're saying Texas is allowed
20 to waive that privilege for those legislators?

21 **MR. FREEMAN:** No, your Honor. I'm simply saying that
22 if this Court finds that the privilege is qualified and should
23 be overcome in this case, that the State of Texas can produce
24 the documents without the burden of third-party subpoenas.

25 **MR. CLAY:** Your Honor, I think this whole discussion

1 highlights why the procedural flaw here isn't just a procedural
2 flaw; it's substantive. The only way to know for sure, absent
3 constant hounding of legislators, to know whether or not they
4 would like to assert the privilege is to subpoena them. And
5 then if they respond with -- with the privilege, then they are
6 asserting the privilege. If they do not respond with the
7 privilege or fail to respond, then they have waived the
8 privilege. That's why this Rule 45 is written the way it's
9 written, is so that -- we're not allowed to waive the privilege
10 of legislators, either the attorney-client or the legislative
11 privilege.

12 **THE COURT:** So, how did it work in the D.C. court,
13 then?

14 **MR. CLAY:** I'm sorry; which, the -- in the --

15 **THE COURT:** The --

16 **MR. CLAY:** In the voter I.D. preclearance case?

17 **THE COURT:** Yes.

18 **MR. CLAY:** Or the redistricting case?

19 **THE COURT:** Because the Government, obviously, got
20 some documents from the legislators in that case.

21 **MR. CLAY:** Well, we had some legislators who were
22 willing to forgo the subpoena and give them the documents.

23 **THE COURT:** Well, that's what I'm trying to get to.

24 **MR. CLAY:** And the --

25 **THE COURT:** But you all did it. It was through the

1 State of Texas. It wasn't the Government subpoenaing them
2 individually.

3 **MR. CLAY:** It was through the Attorney General's
4 office as counsel to several legislators --

5 **THE COURT:** Why can't we work like that in this case?

6 **MR. CLAY:** Well, your Honor, the list of legislators
7 from whom they sought documents in that case was a fraction of
8 the size of this one. And that's part of the problem, is I'm
9 not sure that our office will ever be able to get an answer
10 from 250 different people who are spread all over the state.
11 As you know, the Texas legislature is not in session right now,
12 and they're -- everyone is everywhere. And a lot of these
13 people that they have asked for documents are not even
14 legislators anymore.

15 **THE COURT:** But they're saying there is still some
16 information in the computers, or whatever it may be, that
17 would --

18 **MR. CLAY:** All I'm saying is it's -- since they're
19 not legislators, our ability to track them down and get an
20 affirmative answer from them is --

21 **THE COURT:** I know, but there's --

22 **MR. CLAY:** -- is severely hindered.

23 **THE COURT:** -- probably a hundred at least, half of
24 these, that you could.

25 **MR. SCOTT:** There's 78, is the number, that have

1 responded affirmatively and asked the State of Texas to
2 represent them -- A.G.'s office to represent them here.

3 **THE COURT:** Seventy-eight out of two fifty?

4 **MR. SCOTT:** Two hundred and fifty-one.

5 **THE COURT:** I'm sorry?

6 **MR. SCOTT:** Out of 251.

7 **THE COURT:** Only 78.

8 **MR. SCOTT:** Oh, 250. I'm sorry.

9 **THE COURT:** Only --

10 **MR. SCOTT:** Seventy-eight responded to us, your
11 Honor.

12 **THE COURT:** So --

13 **MR. SCOTT:** They have affirmatively said yes. I
14 mean, there's two on here that have affirmatively said they did
15 not want us --

16 **THE COURT:** What did your letter say?

17 **MR. SCOTT:** To contact us if you -- there is ongoing
18 litigation; there is a current request that seeks to obtain
19 information over which you have a privilege -- and I will get
20 you a exact copy of it. I don't have it with me right now,
21 your Honor.

22 **THE COURT:** And you gave them a date certain?

23 **MR. SCOTT:** Let me know if you want the State of
24 Texas OAG to represent your interests in asserting that
25 privilege.

1 **THE COURT:** And you gave them a date certain?

2 **MR. SCOTT:** And gave them a date certain. And
3 that's --

4 **THE COURT:** And that date has passed.

5 **MR. SCOTT:** Yes, ma'am.

6 **THE COURT:** Then, I'm sorry; I think they don't get
7 to claim that. And we -- at some point we need to have this
8 addressed.

9 **MR. CLAY:** Your Honor, I'm not sure how they -- how
10 their not being subject to a legitimate request for production
11 and their nonresponse to a letter from us constitutes a waiver
12 of their privilege. The rule says that they're supposed to be
13 subpoenaed because they're nonparties. If they have failed
14 to --

15 **THE COURT:** Didn't the D.C. court at some point say,
16 look, they've waived it; if they haven't brought it up at this
17 point, they've waived it? And I'm not saying we're there yet
18 in this case, but wasn't there -- wasn't there some language in
19 one of those cases? Maybe it was *Perez*; I don't think so --
20 that said: Okay, at this point, hasn't been brought up, it's
21 waived. And I don't think -- it sounds like they were not
22 individually subpoenaed in that -- in that case.

23 **MR. CLAY:** They weren't. And that's -- that's -- and
24 I don't want to get into the legal strategy behind that,
25 because that's attorney-client privilege, but in that case

1 we -- the legislators made the decision -- the limited group of
2 legislators from whom they sought documents made the decision
3 that they would forgo a subpoena and just -- and just
4 willingly --

5 **THE COURT:** Okay. How many were we talking about in
6 that case?

7 **MR. CLAY:** I don't remember. I think it's in the few
8 dozens, right?

9 **MR. FREEMAN:** I believe it was over 50.

10 **THE COURT:** So, then -- go ahead.

11 **MR. ROSENBERG:** Ezra Rosenberg on behalf of MALC and
12 Texas NAACP. It strikes me that, at least as a first step, we
13 should be able to begin with that universe which were, you
14 know, among the people who were most involved in SB 14. The
15 State just stated that it has those documents -- that those
16 documents were not given pursuant to -- were not provided
17 pursuant to subpoena, and, you know, we have a very short time
18 period in which to --

19 **THE COURT:** Well --

20 **MR. ROSENBERG:** -- to do this discovery.

21 **THE COURT:** -- I'm trying to do that. I'm trying to
22 narrow what we're dealing with here.

23 **MR. ROSENBERG:** And, so, I would suggest that, at
24 least step one, let's deal with that group of -- I think it's
25 30, 31, whatever it is, and those were some of the key people,

1 and let's get their documents.

2 **THE COURT:** What does Texas have to say on that?

3 **MR. CLAY:** Well, I mean, I still think that they
4 need -- we need to go through the subpoena process, because
5 each of these legislators may want to assert the privilege in a
6 different way, and they need a chance --

7 **THE COURT:** Okay. But --

8 **MR. CLAY:** -- for their day in court.

9 **THE COURT:** -- what is it about this case that's
10 different from the other case where we can't kind of work it
11 the same way where maybe those legislators would say --

12 **MR. CLAY:** I think at this particular juncture in
13 time it's that they haven't been faced with an actual request
14 for production.

15 **THE COURT:** I know. And I guess that my question is,
16 why? We've been dealing with this --

17 **MR. CLAY:** I don't know, because we told them in our
18 26(f) conference that they were nonparties and that we would
19 assert legislative privilege. That was four months ago.

20 **MR. FREEMAN:** Your Honor --

21 **MR. CLAY:** I mean, to the extent that time has been
22 wasted, it is not on our end. We --

23 **MR. FREEMAN:** Your Honor, the United States has
24 continuously maintained that the State of Texas includes Texas
25 state agencies and the Texas legislature. The cases cited by

1 defendant to the contrary, two of them the State was not a
2 party to the case, despite the representations of Texas in
3 their brief. In the other case that subpoenas were denied, it
4 had no reason -- no -- nothing to do with whether or not the
5 legislators were a part of the State because there had been
6 subpoenas. There is no basis for the State of Texas to assert,
7 in a case challenging the State's action through its
8 legislature, that the State does not include the State's
9 legislature. In fact, the district court in the I.D. case
10 requested a brief on this issue from the State of Texas when
11 Texas at first made the same claim that subpoenas were
12 necessary. However, just before the brief was due, the State
13 of Texas agreed to produce documents through the State.

14 Now, particularly with regard to legislators, who
15 have agreed to representation by the State in this matter,
16 there is no reason why, if their attorneys are in court right
17 now, we should have to go through the delay of the subpoena
18 process.

19 **THE COURT:** I mean, I kind of agree with that. If
20 they told you all, yes, assert that privilege for me, why can't
21 we work through you all to get to those legislators?

22 **MR. CLAY:** Because they haven't appeared in this
23 case. And the proper way to do it is by subpoena.

24 **THE COURT:** They didn't appear in the --

25 **MR. CLAY:** And I'm not sure how they're arriving at

1 the absolute conclusion that legislators are parties to a case
2 when a state is sued. All of the cases they cite on this
3 legislative privilege, nearly all of them have to do with a
4 subpoena to a nonparty legislator. I mean, that's the process
5 that is supposed to be followed, and they have had four months
6 to do it, and they haven't. And that's not --

7 **THE COURT:** But I guess you have --

8 **MR. CLAY:** -- that's not --

9 **THE COURT:** Texas has the documents.

10 **MR. CLAY:** We have some of the documents.

11 **THE COURT:** And you're saying you can't turn them
12 over because?

13 **MR. CLAY:** Because they're subject to a privilege,
14 either attorney-client or legislative, held by the legislators.

15 **MR. ROSENBERG:** I was just going to restate
16 something, and perhaps in indirect response to what the State
17 just said, is, number one, they have the documents of at least
18 a sub-universe of the legislators that they've gotten for
19 strategic reasons, as they stated, in the Section 5 litigation.
20 And those should be -- we should be able to deal with.

21 And, number two, because this is a qualified
22 privilege, as your Honor stated, your Honor can make use of the
23 strict provisions of the protective order. Obviously, we
24 don't -- we don't want to burden your Honor with having to
25 review documents in camera if they're not going to be offered

1 into evidence -- have those documents produced, have them
2 produced under seal, have them be designated highly
3 confidential, and if and when the parties choose to offer any
4 of those into evidence, then your Honor will be able to take a
5 look at the specific document against any claims of privilege
6 at that time.

7 **MR. DUNN:** Your Honor, this is Chad Dunn, if I may
8 speak a moment. I agree with what Mr. Rosenberg said. The one
9 thing I would add, that the State has been rowing this boat in
10 these cases both in D.C. and San Antonio of, you know, we
11 don't -- our right hand isn't connected to our left hand, and
12 no court has been on this yet. This notion that you've got to
13 go chase down everybody that's on the State payroll, everybody
14 that's associated with the State, get them served with a
15 subpoena, in some cases have it enforced by judges in other
16 federal jurisdictions --

17 **THE COURT:** Yeah, I mean, it does seem unworkable
18 because of the number of people we're talking about and
19 subpoenas.

20 **MR. CLAY:** Well, it's their number though. And
21 that's why the subpoena process is set up how it is, is so that
22 they have to determine -- they have to weigh the costs and
23 benefits of that process. It shouldn't be foisted upon the
24 State. That's not how -- that's not how the rules were
25 contemplated.

1 **THE COURT:** Okay. Let's look at the small number of
2 legislators that you do have documents on. Let's just talk
3 about those.

4 **MR. CLAY:** (indiscernible)

5 **MR. SCOTT:** And for clarification, your Honor --
6 excuse me for a moment -- I want to make sure we understand the
7 path we're going down, because if it's true that any document
8 in the possession of the Dechert law firm, in any of their
9 offices, for any of their clients, is in the possession of the
10 counsel that they have in front of the Court -- and I think
11 that's what I'm hearing -- then anything one of my civil
12 Medicaid fraud divisions goes out after one of their clients
13 has -- we have the ability to then go get those documents from
14 that law firm? And I don't believe that's the case. I believe
15 that each of those clients has the ability to go tee up an
16 issue that they have before a court to protect the privileges
17 that they may have. And that's the logic --

18 **THE COURT:** I get --

19 **MR. SCOTT:** -- that's the line we're going down.

20 **THE COURT:** I get that. I'm just still kind of
21 wondering why in the other court you all could produce those
22 documents for some legislators and here you are saying go
23 subpoena all of them.

24 **MR. ROSENBERG:** If I may respond on behalf of the
25 Dechert law firm.

1 **(Laughter)**

2 The fact is that there was not a previous suit
3 against the Dechert law firm. There was a previous suit
4 against the State of Texas, and you're dealing with a -- what
5 was specifically stated as a strategic decision to have those
6 produced without the necessity of subpoena, and here is another
7 suit involving the State of Texas as a party, and we're not
8 talking about in the lawyer -- purely in their lawyer role, but
9 as the State of Texas.

10 **MR. FREEMAN:** Your Honor, also, to supplement, the
11 State of Texas has requested documents from the U.S. Department
12 of Justice. Now, the party to this case is the United States
13 of America. And by the same logic that Texas has asserted, the
14 documents in the possession of the United States -- or of the
15 U.S. Department of Justice are in the possession of the United
16 States' lawyer. In this case, where the state in its entirety
17 has been sued and the legislature is the body of the state that
18 took the relevant action in -- primarily, with regard to the
19 intent claim, it simply does not make sense that the State
20 could disclaim that the legislature is a part of the State.

21 **MR. CLAY:** I would make one clarification. Part of
22 the reason that we have made requests to the Department of
23 Justice in this case is because they're the administrative body
24 that was charged with preclearing SB 14. And, so, it's not
25 quite a fair comparison.

1 And, in addition, counsel for the plaintiffs a minute
2 ago referred to -- several minutes ago now -- referred to or
3 analogized the legislature to a corporation. That's just not
4 right, because each of these individual legislators is their
5 own particular office, and they -- yes, they meet as a body and
6 make decisions eventually by vote, as a body, but they're --
7 they're individual persons and individual political figures.

8 **THE COURT:** Okay. I'm going to backtrack, because I
9 got everyone off track with -- I had some specific questions,
10 but if the Government wants to argue its motion to compel
11 generally, you can proceed on that. I'm trying to -- I was
12 trying to narrow the issue.

13 **MR. CLAY:** I think that --

14 **THE COURT:** But it sounds like Texas is just saying
15 you need to go subpoena everyone. So, you can go ahead.

16 **MR. FREEMAN:** Thank you, your Honor. Thank you for
17 the opportunity to be heard on this motion on such an expedited
18 basis. I know I appreciate it. I'll try and keep my
19 presentation brief and not repeat the issues that we've already
20 addressed.

21 In order to enforce the important federal interest in
22 the elimination of intentional discrimination in voting, the
23 United States has brought suit alleging that the State of
24 Texas, acting through its legislature, has violated Section 2
25 of the Voting Rights Act by enacting SB 14 with a

1 discriminatory purpose. The legislative documents sought are
2 relevant and potentially highly probative to the United States'
3 claim.

4 **THE COURT:** And what all are you seeking?

5 **MR. FREEMAN:** The United States seeks documents that
6 relate to the legislative session and the internal
7 deliberations of the legislature concerning SB 14 and
8 predecessor bills, as well as the actions of the legislature
9 following the decision of the D.C. District Court not to
10 preclear and not to grant a declaratory judgment to the State
11 of Texas and the actions of the Texas legislature in response
12 to the decision of the Supreme Court of the United States
13 vacating that decision and allowing Texas to implement its law.

14 Under the *Arlington Heights* framework, this Court --

15 **THE COURT:** And you're asking that of all these 250
16 or 51 legislators.

17 **MR. FREEMAN:** We are, your Honor, but the burden that
18 the State of Texas is asserting is simply not as high as one
19 might think. Because of the ability that corporations
20 routinely use to conduct searches from the server side using
21 multiple mailbox features, it's simply one search that will
22 pull in all of the relevant documents from all of these -- from
23 all of these legislators' inboxes and archives, and produce
24 them into one set that can be then produced to the United
25 States or further screened for privilege prior to that

1 production.

2 These documents are potentially highly probative. As
3 I discussed earlier -- and I'll keep it short -- the -- both
4 the *Perez* court and the *Texas v. United States* court relied on
5 similar evidence in finding intentional discrimination by the
6 same session of the Texas legislature that we are addressing
7 here. The talking points that the sponsors of SB 14 used in
8 both the house and the senate were identical. And those
9 legislators refused to engage with questions and concerns
10 raised by minority legislators. That's why it's necessary that
11 we reach beyond the universe of documents that were produced in
12 *Texas v. Holder* and -- and reach into the set of documents over
13 which Texas is asserting a state legislative privilege. These
14 include within the privilege logs conversations among the
15 sponsors of the bill, the lieutenant governor's office, the
16 speaker's office, and their staff, and it is -- these documents
17 are certainly relevant and potentially probative to the United
18 States' claim.

19 Texas did not challenge the relevance of these
20 documents until its surreply. However, Texas did not look to
21 either *White v. Regester* or *Rogers v. Lodge*, Supreme Court
22 cases that relied on circumstantial evidence to find
23 intentional discrimination related to voting. The intent of
24 the legislature issue here is not limited to the surface of the
25 bill or to the public statements of the legislators. The

1 Supreme Court cases on which Texas relies predate *Washington v.*
2 *Davis*, in which the Supreme Court began requiring a finding of
3 intent to violate the constitution; and in *United States v.*
4 *O'Brien*, a case on which defendants rely, footnote 30 of that
5 case states that where the intent of the legislative body is
6 the question at issue in a constitutional claim, the general
7 caution against inquiry into a legislator -- a legislature's
8 intent does not apply.

9 If the Court has any other questions about cases
10 raised in defendant's surreply, the United States would be
11 happy to answer them.

12 **THE COURT:** Okay.

13 **MR. FREEMAN:** With regard to the State legislative
14 privilege, the Court has already concluded that a categorical
15 privilege applies. However, under the -- or, excuse me -- that
16 a case-by-case qualified privilege applies. However, under
17 either approach the result should be the same.

18 The five factors that were applied by the *Perez* court
19 as well as the *Favors v. Cuomo* court in New York, *Baldus v.*
20 *Brennan* in Wisconsin, and *United States v. Irving* (phonetic) in
21 the Los Angeles County challenge from a couple of decades ago,
22 those courts all applied five factors: relevance, the
23 availability of alternative documents, the seriousness of the
24 litigation, the role of the Government, and future -- the
25 potential future timidity of the legislature.

1 Texas did not contest the way that these factors play
2 out in its brief. We've already discussed relevance, and we've
3 already discussed that the alternative documents, the ones that
4 Texas did produce, are not sufficient for this Court's
5 *Arlington Heights* inquiry because they are limited to public
6 statements that did not -- did not respond to the concerns of
7 minority legislators.

8 The seriousness of this litigation is beyond
9 question. And the role of Texas as the defendant in this case
10 indicates that the privilege should be given -- should be
11 overcome, because asserting the privilege would allow them to
12 use the privilege as both a sword and a shield. They intend to
13 put forward legislators to speak about their public statements
14 but not allow effective cross examination that would result
15 from being able to see the documents at issue.

16 And, finally, the Court in *The United States v.*
17 *Gillick* said that any mere theoretical assertion of future
18 timidity on legislators is not sufficient. And Texas has not
19 put forward any evidentiary basis to support their claim of
20 privilege that might suggest that Texas legislators will be
21 chilled in their speech following a limited disclosure in this
22 case. In fact, Texas legislators have been producing documents
23 and testifying in Voting Rights Act litigation for decades.

24 Whether defendants rely on dicta found in *Arlington*
25 *Heights*, a pre-*Gillick* decision, in claiming not only that

1 there is a privilege, but that there is some extraordinary
2 circumstances requirement, as the United States explained in
3 its brief, the Supreme Court was referring to the decision to
4 call a legislator as extraordinary and was not saying that
5 there was some threshold finding that was necessary. In fact,
6 in footnote 20 of *Arlington Heights* the Supreme Court noted
7 that there had been legislative discovery in that case and
8 found no abuse of discretion. And there was no finding that
9 that case constituted extraordinary circumstances.

10 Third, defendants have asserted an attorney-client
11 privilege that is far more broad than the actual application of
12 the privilege. With regard to the documents in the privilege
13 log, defendants have not contested the United States' request
14 to compel the documents on which an attorney is merely carbon
15 copied; documents that were communicated between legislative
16 offices, thus waiving any attorney-client privilege between a
17 legislator and their counsel; and to documents that address
18 mere policy or political advice, which is not -- which does not
19 constitute a request for legal advice that would be subject to
20 the attorney-client privilege.

21 Now, Texas has claimed that communications between
22 legislators and the Texas Legislative Council are covered by an
23 attorney-client privilege. But it is not plausible that the 50
24 attorneys in the Texas Legislative Council have formed
25 attorney-client relationships with each of the 181 separately

1 Texas legislators despite the conflicts that exist between
2 those legislators on the issues at stake. Even if this Court
3 were to find that legislators had granted the affirmative
4 waiver necessary to overcome those conflicts -- and defendants
5 have not submitted any evidence of such affirmative waiver in
6 support of their privilege claim -- then, at a minimum,
7 communications with the research division of the Texas
8 Legislative Council cannot be covered by the attorney-client
9 privilege. As Ms. Fulton, the head of the Texas legal -- legal
10 division of the Texas Legislative Council explained in her
11 declaration, there are distinctions between the legal division
12 and the research division, and the research division does not
13 provide legal advice.

14 **THE COURT:** So, the documents that have been
15 requested by the Government, these -- State of Texas or the
16 defendants have said both the legislative privilege applies and
17 the attorney-client privilege applies to all of them?

18 **MR. FREEMAN:** No, your Honor.

19 **THE COURT:** No; just --

20 **MR. FREEMAN:** The assertion of attorney-client
21 privilege based on the production for purposes of discovery was
22 a new argument raised in defendant's surreply. They have --

23 **THE COURT:** But it just targets certain documents?

24 **MR. FREEMAN:** Yes. And the United States does not
25 contest the full universe of documents over which Texas has

1 asserted the attorney-client privilege. There are some good
2 claims there. We just believe that the attorney-client
3 privilege has been asserted more broadly than the actual
4 privilege would permit. The legislative privilege is at issue
5 in nearly every document raised on the three privilege logs at
6 issue that concern legislative documents.

7 Finally, and we have discussed this issue at length,
8 the legislative documents are in the possession, custody, or
9 control of the State of Texas. Courts have noted that that --
10 that those three items are in the disjunctive. It only is
11 required that a document be in the possession rather than
12 necessarily the custody or control of a party in order for
13 those documents to be subject to disclosure. By analogy, it's
14 possible for a bank which has been given documents with the
15 belief of confidentiality to, nonetheless, turn them over to
16 the United States subject to a proper warrant. And,
17 specifically, the claim that Texas has made with regard to
18 possession, an analogy can be made to the Stored Communications
19 Act that prevents disclosure when you have a public e-mail
20 provider but does not apply to a private e-mail server, such as
21 this one. The e-mail -- the e-mails that are at issue are in
22 the possession of a Texas state agency, and that state agency
23 is a component of the State of Texas, which is the principal
24 defendant in the United States' suit in this case.

25 Finally, Texas has made various assertions with

1 regard to server-side searches and its ability to conduct
2 searches through the server rather than through the end user,
3 the legislator. In 2014 their -- their claim that they are not
4 able to do that is simply not plausible. The software that
5 Texas uses, Microsoft Exchange, includes a multi-mailbox search
6 feature. It's not plausible that Microsoft has disclaimed the
7 feasibility of using that, that search feature, as is
8 represented in Mr. Hining's (phonetic) declaration. And, so,
9 the United States believes that Texas should -- can and should
10 -- search for and produce even the remaining documents that are
11 not currently on the privilege log and clearly in the State's
12 possession.

13 In sum, the United States is not aware of any case in
14 which a Court has denied the United States access to
15 legislative documents in litigation under Section 2 of the
16 Voting Rights Act. Any case. There is no basis to deny access
17 in this case. And, therefore, the United States respectfully
18 requests that this Court grant the pending motion to compel.

19 Thank you so much, your Honor.

20 **THE COURT:** Thank you.

21 **MR. CLAY:** Your Honor, since we've already discussed
22 so much here today, I'm just going to respond to a few points
23 that counsel for plaintiffs just brought up, the first being
24 the burden question that results from their expansive request
25 to over 250 legislators and the -- beyond just that, they have

1 an idea about how the State or the legislature should go about
2 responding to these requests and are demanding that we follow
3 that process. The problem with that, namely, doing searches
4 through TLC, or the Texas Legislative Council, the problem with
5 that is they fundamentally misunderstand the relationship
6 between -- the technological relationship between the
7 legislative council and the individual legislators.

8 Again, the analogy of a corporation has come up, and,
9 again, it is simply incorrect. TLC is not the IT department
10 for the legislature. And what they would have us do is conduct
11 the searches, the expansive searches that they want, through
12 the TLC. The problem with that -- and I'm going to let my
13 colleague, David Whitley, kind of explain the technical stuff,
14 because I don't really understand that a whole lot -- but is
15 that that would actually produce an under-inclusive amount of
16 documents. It likely would produce less documents and would
17 fail to uncover documents that are responsive to their request
18 by simply searching through the individual offices of the
19 legislators.

20 And I'll let David Whitley discuss the technological
21 issues.

22 **MR. WHITLEY:** Your Honor, the corporate structure
23 that DOJ contemplates does not exist in the legislature. These
24 are individual office holders; they each have records,
25 retention schedules that are separate for each of their

1 offices; and the contemplation by DOJ to search the legislative
2 council for their e-mails on a server-side search does not
3 accomplish what DOJ seeks to accomplish because -- and one of
4 the things that Mr. Freeman referred to was a in-place e-
5 discovery, I believe. And that is a Microsoft Exchange 2013
6 function, and at our 26(f) conference plaintiff's counsel
7 pointed out that they run Exchange 2010. So, they are unable
8 to search PST files, which are how the e-mails are saved, in a
9 programmatic fashion. Each of these individual legislator --
10 legislative offices archives their e-mails however they wish.
11 They do not archive them in a way that legislative council can
12 search one big server for all of these e-mails. That
13 capability simply does not exist.

14 **THE COURT:** Okay.

15 **MR. CLAY:** The next issue I'd like to address is the
16 privilege with respect to documents that flow from the
17 legislative council to and from legislators.

18 **THE COURT:** That's what you all are claiming
19 attorney-client privilege on?

20 **MR. CLAY:** We're -- with respect to some of it, yes,
21 it's attorney-client privilege. A lot of what TLC does is
22 provide legal advice for the various legislators.

23 **THE COURT:** And what is the case law on that? What's
24 the relationship there between TLC and the legislators?

25 **MR. CLAY:** Well, the relationship is they have a

1 legal division where the legislators can go to get legal
2 advice. Any individual legislator can go there and get legal
3 advice. The statutory framework in the Texas Government Code
4 makes very clear that's to be confidential and --

5 **THE COURT:** Does anywhere say that's an attorney --
6 is there any authority to support that that's an attorney-
7 client relationship?

8 **MR. CLAY:** I'm not aware of any in the Government
9 Code, but, of course, to have an attorney-client privilege
10 under the federal common law, it doesn't have to be explicitly
11 stated there; it only has to satisfy the elements of the
12 federal common law. And what's happening here, there's
13 legislators --

14 **THE COURT:** And you're saying the elements are
15 covered?

16 **MR. CLAY:** Absolutely. Because --

17 **THE COURT:** As to the legal division.

18 **MR. CLAY:** As to the legal division, and which --

19 **THE COURT:** What about the research division that was
20 brought up?

21 **MR. CLAY:** The research division I don't think that
22 TLC would say is -- and, again, we're speaking on their behalf
23 here as part of -- they're part of the legislative branch, so
24 I -- I hesitate to speak too definitively for them; but I think
25 what they would say is that the research division is generally

1 not, although maybe not categorically, generally not involved
2 in giving legal advice. What they are involved is giving
3 research and data, legal drafting, things of that nature, that
4 fall within what is generally considered to be the core of
5 legislative privilege.

6 If you look at some of the cases that were cited in
7 the plaintiffs' briefs, particularly in the context of voting
8 rights cases, like the committee for -- I'm sorry -- the *Kay*
9 *versus City of Rancho Palos Verdes* -- it talks about
10 governmental entities being covered by the privilege when they
11 worked very closely with the legislators for these very obvious
12 legislative functions like drafting and research. And, so, we
13 believe that it falls within the core of what is considered the
14 legislative privilege.

15 The next thing I would address is the sword versus
16 shield argument that is simply -- the fact that we have some --
17 for some reason waived privilege or are trying to use it
18 unfairly because legislators may or may not testify at a trial
19 that may or may not happen isn't indicative that the privilege
20 is being used as a sword or a shield. Those legislators would
21 testify as to what has happened in the public sphere, in the
22 public record, and they will be able to be cross examined on
23 that. And that is the very crux of what *Arlington Heights*
24 allows for showing intentional discrimination is reliance on
25 the circumstantial evidence, the public record, the legislative

1 record, and the public debate that happened in those. And the
2 fact that legislators may testify to that doesn't implicate the
3 privilege being used as a sword or a shield at all.

4 The next thing I would address, and relatedly, is the
5 previous testimony by legislators. Much of that came in the
6 context of redistricting, and none of the cases they cite
7 suggest that that testimony was over the assertion of privilege
8 and that privilege was abrogated by the court in those cases.
9 And the reason I bring up the fact that it's in a redistricting
10 case is because redistricting is a fundamentally type --
11 different type of legislative activity in the way that it
12 involves thousands of thousands decisions on a very local level
13 that are typically done in Texas and elsewhere as kind of a
14 coalition process where various parts of the state and various
15 parts of legislatures will draw drop-in maps with respect to
16 that part of the state. And they're the ones who know about
17 the decision-making and the reasons why particular decisions
18 were made in those cases, versus here we have a run-of-the-mill
19 bill that everyone has had the opportunity to research and vote
20 on, and it doesn't involve different distinct parts of the
21 legislature making individualized decisions at a local level.
22 And, so, testimony in redistricting cases is -- from
23 legislators is very, very common and not that unusual. And
24 that's why a lot of what we've been discussing here today is
25 the reason that the strategy in those cases probably unfolded

1 the way it did, is because in order to really talk about the
2 purpose of those cases you kind of need to get to the -- to the
3 individual legislators who helped draw the lines.

4 The last thing that I would contest is the idea that
5 we've admitted that these documents are relevant. I think if
6 you read the voting rights, the Section 2, the Fifteenth
7 Amendment cases that are cited in the plaintiffs' case in their
8 briefs, there is a pretty good analysis in *Kay versus City of*
9 *Rancho Palos Verdes* and probably a better analysis in the
10 *Committee for a Fair and Balanced Map* case where the relevance
11 and probative value of various types of legislative activities
12 or communications is weighed against the balancing test that
13 the plaintiffs would have this Court undertake. And certain
14 types of communications, which we've discussed in our brief,
15 are clearly of very little probative value because the Supreme
16 Court's caution on looking at the individual thought processes
17 or deliberations of an individual legislature and then
18 extrapolating that across the legislature's purpose as a whole.
19 Those cases --

20 **THE COURT:** I don't think there is any question that
21 the information is relevant that they're looking for, for this
22 type of case.

23 **MR. CLAY:** I think -- I think what those cases say
24 is -- and I think this is -- this is what motivated the
25 district court of the District of Columbia in the preclearance

1 case to withhold documents along these lines -- is that their
2 probative value is very little in relation to what -- the legal
3 standard they needed to satisfy on *Arlington Heights*, and when
4 you weigh that against the intrusiveness that -- of -- and
5 burden of conducting discovery amongst all of these different
6 legislators, it's outweighed in those cases.

7 Finally, you know, we've talked about the nonparty
8 over and over again. The plaintiffs continue to maintain that
9 these legislators are somehow a party to this case when they
10 haven't been named, when all of the cases in which they cite in
11 their briefs that talk about legislative privilege presume that
12 they are not legislators because they discuss third-party
13 subpoenas to nonparty legislators. And we would just rest upon
14 the other cases we've cited in our brief. There -- it's very
15 clear that legislators are not a party to a lawsuit against the
16 State.

17 Finally, I think one of the things that's gotten lost
18 in our earlier discussion is, you know, because they've
19 never -- the plaintiffs have never made an overture about
20 subpoenas, we've never broached the subject of whether or not
21 the Attorney General's office would accept the subpoenas on
22 behalf of the legislators. And the answer to -- with respect
23 to the ones that we represent is, yes, that we would. And
24 then, at that point, I think it becomes clear that once we have
25 a standard about what legislative privilege is, we can go about

1 turning over whatever documents don't fall within the purpose
2 of that or the scope of the privilege.

3 **THE COURT:** So, for how many was it? A hundred
4 and --

5 **MR. CLAY:** I think it was 78.

6 **MR. SCOTT:** Seventy-eight, your Honor, plus there's
7 two that are actually represented by the plaintiffs that are on
8 that list, so that gets us up to 80.

9 **MR. CLAY:** If there is no --

10 **THE COURT:** So, for those people you're saying they
11 don't need to subpoena them if the Court decides that's what
12 should be done?

13 **MR. CLAY:** Well, I'm saying we would -- we --

14 **THE COURT:** That they can work through -- you will --

15 **MR. CLAY:** We would accept a subpoena on their
16 behalf, and that we would -- we would --

17 **THE COURT:** And they will work through you.

18 **MR. CLAY:** Yes. That --

19 **THE COURT:** And not with --

20 **MR. CLAY:** That's right. If there are no further
21 questions --

22 **THE COURT:** Okay. Let me ask you about the attorney-
23 client privilege, because I guess the issue is the Government
24 is saying that you all are trying to include -- it's too broad,
25 what the State of Texas is saying, or what the defendants are

1 saying, regarding that privilege, and you're trying to cover
2 documents where maybe an attorney was simply copied and there
3 is no attorney-client relationship there or maybe documents
4 regarding policy matters or political things. So --

5 **MR. CLAY:** And, to be honest, I'm not sure exactly
6 what they refer to. I mean -- I mean, normally, the way I
7 think this would go is they would refer to particular things in
8 our very extensive and detailed privilege logs and we'd have a
9 debate about those. Simply -- I mean, I'm not sure --

10 **THE COURT:** But you agree that would --

11 **MR. CLAY:** -- how to respond to their arguments
12 that --

13 **THE COURT:** You agree political matters wouldn't be
14 covered, policy matters wouldn't be covered; it's simply
15 advice, legal opinions, you know --

16 **MR. CLAY:** As I understand it, the privilege -- the
17 attorney-client privilege covers confidential legal advice or
18 legal opinions or legal representation.

19 **THE COURT:** So --

20 **MR. CLAY:** Confidential communications that are for
21 that purpose, either representation in court --

22 **THE COURT:** So, you all haven't truly discussed some
23 of the specific documents that the Government says: These are
24 not attorney-client privilege because they're X; they're
25 political matters; they're policy matters; there is not an

1 attorney here, it's just an attorney was copied; or there is
2 not an attorney relationship here. You all haven't discussed
3 those documents?

4 **MR. CLAY:** No. They did not -- they have not brought
5 up any individual documents which they believe are -- are --

6 **THE COURT:** Isn't that the way this works, that you
7 all -- Government needs to point out to them why these
8 documents are not based on your privilege log, why these are
9 not protected by the privilege?

10 **MR. FREEMAN:** If I may, your Honor, the United States
11 raised two specific category -- two specific instances in the
12 privilege logs that clearly addressed policy matters. There
13 were policy memos contained within the speaker's office, and I
14 believe within the lieutenant governor's office there was --
15 there were e-mails addressing polling data. However, in most
16 cases the privilege logs are not sufficiently specific for the
17 United States to be able to determine whether or not they
18 address --

19 **THE COURT:** Okay. Have you all sat down and talked
20 about that? Look, these documents here, clearly not covered;
21 you've given defendants a chance to look at that. These
22 documents, I'm not clear on what this is, to determine if there
23 is a privilege.

24 **MR. FREEMAN:** Your Honor --

25 **THE COURT:** Because if you can't do it, I certainly

1 can't do it based on the evidence -- well, I might read it
2 differently, I guess --

3 **MR. FREEMAN:** In most cases --

4 **THE COURT:** -- and think there is enough information.

5 **MR. FREEMAN:** I'm sorry for interrupting.

6 **THE COURT:** That's okay. I'm sorry, too.

7 **MR. FREEMAN:** In most cases, all or nearly all of the
8 documents at issue are -- they are also asserting state
9 legislative privilege. So, unless and until this Court makes a
10 ruling on the assertion of state legislative privilege, we
11 can't really get to these documents. That's exactly what
12 happened in *Texas v. Holder*.

13 **THE COURT:** But I guess that's why I was asking
14 earlier the context of. Are there separate attorney-client
15 privileges; are they all legislative privilege documents, and
16 on top of that there are certain attorney-client privilege on
17 some of those; and -- so --

18 **MR. FREEMAN:** The latter, your Honor.

19 **THE COURT:** Okay. Are you all confident that you all
20 fully -- because I read the issue in the briefing regarding
21 these are nonparties and they need to be subpoenaed
22 individually. Now there is a little -- I think State of Texas
23 is now saying: For at least this number of legislators we will
24 accept their subpoenas and you all can work through us, but
25 still saying they need to be subpoenaed, but at least we're

1 directing them to the party, the defendants here. Are you all
2 comfortable you all have briefed that issue fully? Because I'm
3 going to need to go back and look at that in your briefs.

4 Government?

5 **MR. FREEMAN:** Your Honor, the Government is
6 comfortable with the fact that it has briefed out that the
7 State of Texas includes its legislators. I'm not sure if I
8 otherwise understand exactly your question. In footnote 11 of
9 the Government's reply we did respond to the cases cited by
10 Texas with regard to their claims that legislators are
11 nonparties. The real difference is that when private parties
12 sue a state they generally sue an executive officer because of
13 Eleventh Amendment immunity. And that's what happened in the
14 two cases at issue that were raised by the State. In *Alabama*
15 *Education Association v. Bentley*, only executive branch
16 officials had been named as defendants. And in *Karcher v. May*,
17 the only named defendants were the New Jersey Department of
18 Education, its commissioner, and two township boards of
19 election -- or excuse me -- of education. The United States
20 can and has sued the State of Texas in its entirety, and we
21 believe that the State of Texas includes the legislators.

22 **THE COURT:** All right.

23 **MR. CLAY:** I would just say, we haven't, obviously,
24 had a chance to respond to the reply that they filed because
25 the briefing schedule didn't contemplate that, so --

1 **THE COURT:** Right.

2 **MR. CLAY:** -- the footnote to which he refers we
3 haven't responded to. I'm happy to take a look at and discuss
4 with the legal team whether we need to do any further briefing
5 and, if we do, submit something at that time.

6 **THE COURT:** Okay. Anything else from anyone else
7 present on this issue?

8 **MR. ROSENBERG:** May I, your Honor?

9 **THE COURT:** Yes.

10 **MR. ROSENBERG:** Thank you, your Honor. I'll be very
11 brief. I want to respond to Mr. Clay's comments on -- first on
12 relevance. I had to chuckle when he described SB 14 as a run-
13 of-the-mill legislation, because, as we've set forth in our
14 brief, this was treated as anything but run-of-the-mill by the
15 legislature. There were extraordinary legislative procedures
16 that were taken, decades-old legislative procedures that were
17 abrogated, and we believe that's one of the reasons why this
18 discovery is particularly relevant.

19 Second, Mr. Clay talked about the fact that you can't
20 hold a single legislator responsible for the entire
21 legislature's intent. One of the cases the State relies on
22 came out the wrong way in terms of its balancing, which is
23 *Florida versus United States*, but, as your Honor indicated,
24 this is highly relevant. And there, even in that case, the
25 Court said:

1 "A single legislator's testimony on the legislator's
2 own purpose or a single legislator's opinion
3 testimony about other legislators' purpose may not
4 say much about the actual overall legislative
5 purpose, but the testimony may say enough to move the
6 needle at least a little, and relevance requires
7 nothing more."

8 And that's, again, one of their cases. And the
9 reason that case went in the other direction were at least two
10 reasons that we don't have here. First, there the State was
11 not going to call any legislator. And the Court specifically
12 said:

13 "A legislator who agrees to testify, of course, may
14 be deposed; by voluntarily testifying, the legislator
15 waives any legislative privilege on the subjects that
16 will be addressed in the testimony."

17 So, another reason why here, where Texas has
18 indicated that legislators were or are likely to be witnesses,
19 another reason for this discovery.

20 But overall, I think it's important for the Court to
21 focus on the ramifications of the State's position. Under the
22 State's position, if those legislators who were the leadership
23 in pushing through SB 14 had in their files or on their e-mails
24 factual information that was at odds with the public positions
25 that they were taking in SB 14, we're not allowed to see that

1 and this Court is not allowed to see that. Under the State's
2 position, if those same legislators who were pushing SB 14 in
3 e-mails and documents stated that their intent was to suppress
4 minority votes, apparently we're not allowed to see that and
5 your Honor is not allowed to see that. And that can't possibly
6 be the answer under Section 2.

7 In terms of burden, I think we've talked a lot about
8 that. I think the easy first step, again, is to start with
9 those 30 some-odd legislators whose documents the State has
10 from the Section 5 litigation, have that produced under seal,
11 be highly confidential, and let discovery start. Because I
12 think that's -- it's important for that to occur without burden
13 on your Honor to do in-camera review until it's absolutely
14 necessary.

15 I'd be happy to take any questions.

16 **THE COURT:** All right. Anything else from the
17 plaintiffs? And then I'll let the defense respond.

18 **MR. SPEAKER:** Okay. Thank you.

19 **MR. DUNN:** Your Honor, Chad Dunn on behalf of the
20 Veasey LULAC plaintiffs. And I won't repeat anything; there
21 are a couple of things that happened in the D.C. case, I think,
22 that the Court should be aware of or reminded of in the event
23 it is aware of it.

24 You know, it's impossible, obviously, to know exactly
25 what's going on here, but this notion of, Let's issue subpoenas

1 to 250 something people, it's busy work. And, more
2 importantly, it's work that's going to take up a significant
3 amount of time. And one of the things the State was chastised
4 for at length by the three-judge court in D.C. was taking too
5 long to do things, and the court actually was concerned that
6 the State's proposals on discovery were actually designed to
7 burn up the discovery period and prevent meaningful discovery
8 in advance of what was a much shorter trial schedule than we
9 even have in this case.

10 So, I'm here to make some constructive proposals to
11 the Court on how to deal with these issues of -- in light of
12 the Court's at least preliminary finding that there is a
13 qualified privilege and that it must be dealt with; instead of
14 having the parties take what I would assume would be at least a
15 couple of weeks to sit down and come up with 78 subpoenas that
16 the State would then accept -- on document requests, everybody
17 already knows what they are -- that we ought to be able to set
18 those aside, the Court ought to be able to set a deadline in
19 the reasonable future, say two weeks, for the State to turn
20 over those documents that are in their possession.

21 With respect to the remaining legislators who didn't
22 respond, we think the Court is in -- is in even footing to
23 decide now that that's a waiver. And, indeed, that's the way
24 the D.C. court -- they said, look, if it hasn't been assigned
25 by now, then it's -- it's decided. But if the Court has

1 reservations about that, the State ought to send out a notice
2 tomorrow, the response deadline ought to be Wednesday of next
3 week, and if a legislator hasn't invoked privilege or doesn't
4 respond, you know, that's it, so that we have a final universe
5 of the people involved. And I think it really will take some
6 direction from this Court and some hard deadlines in order to
7 move past this issue.

8 Now, the final thing I'll say relates to depositions,
9 because I want the Court to be aware that this is what's coming
10 around the corner. Obviously, the parties have to get to work
11 taking depositions. And it's ironic that the State takes the
12 position that it can't control a legislator, it can't even
13 communicate efficiently with any legislator, because I can
14 assure this Court, come September 2nd, the State's going to
15 have an exhibit list of legislators and their staff that
16 they're going to march in here one after another and take the
17 position that this wasn't discriminatory in design or won't be
18 discriminatory, in effect, et cetera. And they want to be able
19 to put on that testimony and prohibit or prevent any meaningful
20 cross examination of it. And that's really what these
21 documents are all about. And that's why the court in *Perez*,
22 the Section 5 court in -- on redistricting in D.C., the photo
23 I.D. court in D.C., have all found ways to get these documents
24 turned over. Then, when we transition to depositions, the
25 legislators and their staff are available to answer meaningful

1 questions about those documents, and the Court can simply
2 decide the matters of privilege at trial. And that, it seems
3 to me, is the only way to move this process forward. The Court
4 should provide production of the documents and then at trial it
5 can make individual decisions on admissibility, which is, in
6 fact, how it's been handled in the other analogous cases I
7 mentioned.

8 Thanks for taking the time.

9 **THE COURT:** All right.

10 **MR. FREEMAN:** If I can just respond to a few points,
11 your Honor.

12 **THE COURT:** Okay.

13 **MR. FREEMAN:** With regard to the burden, it's --
14 simply put, it's the United States' decision to ask Texas to
15 provide the documents that it has in its possession, and
16 whether or not the United States might wish to obtain other
17 documents that might not be in the possession of the Texas
18 Legislative Council that are in the possession of Texas
19 legislators, that -- that's our decision. And, so, the fact
20 that they may describe the search as under-inclusive does not
21 eliminate the fact that the documents are in their possession.

22 In addition, while Exchange 2010, the software that
23 they run, does not include in-place e-discovery, as we noted in
24 a footnote, in two -- in Exchange 2010, it's called multi-
25 mailbox search. But it does the exact same thing; and they are

1 perfectly capable of searching numerous in-boxes and PST files
2 and archive files all at the same time.

3 With regard to the Texas Legislative Council and an
4 attorney-client privilege, the three-judge court that heard the
5 redistricting case did decide that there was no attorney-client
6 privilege, that the relationship was described as confidential,
7 but the Texas legislature knew the difference between
8 describing a relationship as confidential --

9 **THE COURT:** And that was both --

10 **MR. FREEMAN:** -- and one as privileged.

11 **THE COURT:** -- as to legal and research division?

12 **MR. FREEMAN:** That's correct, your Honor. The State
13 of Texas requested that that decision be vacated so long as
14 they would turn over the documents at issue, and the United
15 States did consent. But the United States believes that the
16 logic contained in that case is completely valid in this case
17 as well.

18 **THE COURT:** So, documents were turned over there, but
19 they're not being turned over here, some of them, correct?
20 Based on privilege? Or no --

21 **MR. SCOTT:** That's not right. We've turned over
22 every document that was produced last time. We did that as
23 part and parcel of the -- from the get-go --

24 **THE COURT:** And that included --

25 **MR. SCOTT:** -- to avoid --

1 **THE COURT:** -- legislators' claims of --

2 **MR. CLAY:** But --

3 **THE COURT:** -- of documents that would be claimed as
4 privileged?

5 **MR. CLAY:** Your Honor, he's referring to the
6 redistricting case in Washington, D.C., and, so, obviously,
7 those --

8 **THE COURT:** Okay.

9 **MR. CLAY:** -- those documents are not in issue in
10 this case.

11 **THE COURT:** Okay. So, regarding the --

12 **MR. CLAY:** It's very confusing.

13 **THE COURT:** I know it is. The *Texas v. Holder*, I
14 believe, was the voter -- voter I.D. case, right?

15 **MR. FREEMAN:** Yes, your Honor.

16 **THE COURT:** That's not the court that decided the TLC
17 issue.

18 **MR. FREEMAN:** No, your Honor.

19 **THE COURT:** Okay. So, documents that were produced
20 by the defendants in the *Texas versus Holder* case have not been
21 produced in this case?

22 **MR. CLAY:** No, they have.

23 **THE COURT:** They have.

24 **MR. CLAY:** Yeah, for the redistricting --

25 **THE COURT:** And those -- some of those documents

1 included documents that were privileged -- previously claimed
2 as being protected by the legislator privilege?

3 **MR. CLAY:** To the extent that the D.C. court
4 disagreed with our analysis of legislative privilege --

5 **THE COURT:** And it set out --

6 **MR. CLAY:** -- and any claim (indiscernible) those
7 documents.

8 **THE COURT:** -- specific things to turn over?

9 **MR. CLAY:** Yes.

10 **THE COURT:** And you all did that.

11 **MR. CLAY:** Yes.

12 **THE COURT:** And that's --

13 **MR. CLAY:** Yeah, part of our --

14 **THE COURT:** -- good for here, too.

15 **MR. CLAY:** Yes.

16 **THE COURT:** Those documents.

17 **MR. CLAY:** We have agreed in our joint conference,
18 the 26(f) conference, that those would be authenticated, and we
19 have turned those over and provided them to all parties in this
20 case.

21 **MR. FREEMAN:** Your Honor, at issue here are the
22 documents that were withheld in *Texas v. Holder* that we believe
23 should be turned over in this case. And we believe --

24 **THE COURT:** So, is that what I'm dealing with?

25 **MR. FREEMAN:** Yes. Yes, your Honor.

1 **THE COURT:** Okay.

2 **MR. FREEMAN:** You made a small circle. It's --

3 **THE COURT:** Well, I --

4 **MR. FREEMAN:** -- actually a very big circle.

5 **THE COURT:** Well, it was bigger.

6 **(Laughter)**

7 **MR. FREEMAN:** Yes. But we would argue that it wasn't
8 much bigger, that the core documents at issue were never turned
9 over, and they are the documents at issue here.

10 And just to clarify with regard to the research
11 division, there were claims of attorney-client privilege made
12 with regard to communications between attorneys employed by the
13 research division and legislators. And if this Court were able
14 to make a categorical ruling that the attorney-client privilege
15 does not apply to any attorney employed by the research
16 division, that would address a large number of the documents --

17 **THE COURT:** And those were not turned over in *Texas*
18 *v. Holder*.

19 **MR. FREEMAN:** Yes, your Honor. Those --

20 **THE COURT:** Yes, they were, or, no, they weren't?

21 **MR. FREEMAN:** The documents were not turned over in
22 *Texas v. Holder* --

23 **THE COURT:** Okay.

24 **MR. FREEMAN:** -- both because of the assertion --
25 because of the assertion of state legislative privilege, and so

1 the court did not reach attorney-client privilege issues in
2 most instances.

3 With regard to *Arlington Heights*, Texas has
4 repeatedly stated that *Arlington Heights* is limited to public
5 materials. There is no language in *Arlington Heights* that
6 states that, and numerous cases applying the *Arlington Heights*
7 framework have looked at documents that were not released to
8 the public. The Fourth Circuit in *Smith v. Town of Clarkton*
9 put this pretty succinctly, that it is very unlikely that a
10 legislator with a discriminatory intent is going to publicly
11 state that they have discriminatory intent. And that is why it
12 is necessary to look -- to engage in a searching and sensitive
13 inquiry to all documents that could be looked at.

14 Finally, with regard to the legislators, as I stated
15 before, the difference between the cases that Texas is relying
16 upon and this case is the United States is a plaintiff, and in
17 most cases, because of that, the United -- because of that, the
18 legislators have been subpoenaed because they were not parties,
19 because they cannot be sued by private parties. But here they
20 are part of -- they are part of Texas.

21 And that -- that's all I wanted to respond to, so
22 thank you so much.

23 **THE COURT:** Okay. Can I just ask: How can we figure
24 out which legislators are asserting a privilege? You all have
25 already kind of done a preliminary letter reaching out to them.

1 Can we follow up with another letter, as suggested?

2 **MR. SCOTT:** We will do anything the Court asks us to
3 do with regard to contacting the legislators. It is a process,
4 and because a lot of them are gone. And timing is the issue,
5 probably more than anything else, but we're -- we will call
6 them all, we'll write letters to them, whatever you would have
7 us do.

8 **THE COURT:** Send another letter, as suggested by
9 counsel here, and giving them, you know, two weeks to respond,
10 a deadline, that if they don't let you know that they're going
11 to be asserting that privilege, Court's going to take that as a
12 waiver --

13 **MR. SCOTT:** And I guess --

14 **THE COURT:** -- of the privilege.

15 **MR. SCOTT:** -- from a procedural standpoint, we don't
16 want to get in a position of waiving arguments we might have
17 with regard to that it's their obligation to at least tee up
18 something that would make that universe smaller.

19 **THE COURT:** I know, but at least we can get something
20 moving in the meantime.

21 **MR. SCOTT:** Absolutely.

22 **MR. CLAY:** Your Honor, the only thing I would say is
23 I'm not sure what the difference is between a subpoena from
24 them, which would clear up the legal problems that would be
25 involved with a letter from us, and a letter from us. I'm

1 not -- I fail to understand how in four months that they
2 haven't been able to issue a single subpoena. I'm just not
3 sure what the difference between a letter from us, which we
4 have already done, which --

5 **THE COURT:** Okay. Well, you're going to do another
6 one, it sounds like. Right?

7 **MR. SCOTT:** If the Court instructs, we will.
8 Absolutely.

9 **THE COURT:** So instructed.

10 **MR. CLAY:** I just don't think that resolves the
11 waiver issue at all, because it's not our privilege to assert.

12 **THE COURT:** I know, and you're not waiving it, and it
13 is an issue, and it's been briefed, and I'm going to --

14 **MR. CLAY:** Okay.

15 **THE COURT:** -- look at it a little bit further.

16 **MR. CLAY:** I would quickly want to just kind of clear
17 up the record on my phrase "run of the mill." When I say "run
18 of the mill," I refer not to mean that it lacks some importance
19 or it wasn't of paramount importance to the leadership, the
20 Texas leadership, or Texas voters. I simply mean that it's --
21 it is a -- it perceives through like -- the redistricting
22 litigation, as I said before, is generally parceled out to
23 various coalitions, usually, you know, among the counties
24 because of the Texas county line rule, which requires districts
25 to be wholly contained within a county. And, so, counties will

1 draw their own maps amongst themselves, amongst the
2 representatives from those various counties, making countless
3 decisions about neighborhoods and streets that ultimately they
4 know about and no one else really does; not even the other
5 legislators when they go to vote on it. And, so, by "run of
6 the mill," I mean it's -- it's not like that. I don't mean
7 that it lacks some importance to the Texas leadership or lacks
8 importance to the Texas voters, which clearly voter I.D. had.

9 The next -- the next I would -- the next point I
10 would respond to is the relevance. I think the case law is
11 clear that the type of intrusive documents that they seek and
12 discovery that they seek about the thought processes and
13 deliberations have some modicum of relevance to the issues in
14 this case. When placed in the balancing test, almost
15 universally the case law says that it is -- it is not to be
16 turned over and that the privilege outweighs the other
17 interests at stake. So, it's not that it isn't relevant. It's
18 that it's only marginally relevant, and when placed in the
19 balancing test, that of the cases that the plaintiffs cite, it
20 is protected by privilege.

21 The next thing I would say about that -- we haven't
22 identified witnesses at all, we have I.D.'d persons who may
23 have knowledge relevant to this case. I mean, that's just kind
24 of a minor point about --

25 **THE COURT:** And why as to those witnesses should they

1 not be able to -- to get this information to cross examine them
2 on?

3 **MR. CLAY:** Because the legislature doesn't waive its
4 privilege by testifying about nonprivileged subjects.

5 **THE COURT:** But if they're going to get up here and
6 say: We did this for this reason, not for discrimination or to
7 have any sort of -- no racial motive or -- why can't they cross
8 examine them, or what's the testimony going to be?

9 **MR. CLAY:** They can cross examine them on the non --
10 on the unprivileged documents and data that's out there.

11 **THE COURT:** How many legislators are you planning to
12 call or might be witnesses in this case?

13 **MR. CLAY:** I mean --

14 **THE COURT:** Just a rough idea. I'm not --

15 **MR. CLAY:** It's --

16 **MR. SCOTT:** I have no earthly idea at this point.

17 **MR. CLAY:** No idea.

18 **THE COURT:** What did you all do in the other case?

19 **MR. CLAY:** I don't remember that either. I'm sorry,
20 your Honor. I'm happy to --

21 **THE COURT:** Approximately?

22 **MR. CLAY:** -- provide that information.

23 **MR. SCOTT:** Happily, I was not a part of it.

24 **MR. CLAY:** Four or five maybe?

25 **MR. FREEMAN:** Your Honor, they've named seven

1 legislators and three legislative aides in their initial
2 disclosures.

3 **MR. ROSENBERG:** And, your Honor, several of them did
4 testify in the Section 5 case.

5 **MR. CLAY:** Yeah, I would say it was around three to
6 five, six, somewhere in that range --

7 **THE COURT:** Okay.

8 **MR. CLAY:** -- that testified in the preclearance
9 case.

10 **THE COURT:** And in that case you all had some
11 documents, just not the extent of the documents you're
12 requesting here, correct?

13 **MR. ROSENBERG:** That's correct, your Honor.

14 **MR. CLAY:** Correct.

15 **THE COURT:** Okay.

16 **MR. CLAY:** The last point I would bring up is this
17 idea -- actually, it's not -- I'm sorry; there might be an
18 ultimate point -- is this idea that somehow the State of Texas
19 is playing a delay game by insisting on -- in invoking the
20 privileges and protections afforded by both the common law and
21 the Federal Rules of Procedure. The other side has known about
22 our position on this issue -- for the parties who have been a
23 part of this case, even at the preclearance stage, they've
24 known about this issue for a couple of years. For the parties
25 who are new to this case, this issue was directly addressed at

1 the 26(f) conference, and any delay that is involved with the
2 assertion of our rights and privileges under the common law and
3 the federal rules is solely on them, and it should not be
4 foisted on the State.

5 **THE COURT:** Okay.

6 **MR. CLAY:** The last point I would bring up is TLC.
7 We've got some affidavits that we provided to the Court that
8 make it clear that the type of search that they want us to do
9 is simply overly burdensome and is unlikely to produce -- it's
10 unlikely to be the only type of search we need to do. We're
11 going to have to go ahead and probably end up doing individual
12 searches of the legislators' office. And that way of searching
13 is likely to produce a fulsome -- a more fulsome and complete
14 response to the requests that they seek. They also would have
15 this Court make categorical statements about the attorney-
16 client privilege and legislative privilege simply by the
17 division of TLC and where attorneys are located within the
18 council. But that's not the federal common law. The federal
19 common law is communications between an attorney and a client
20 that involves legal opinions or legal representation. To the
21 extent that an attorney in the research division is providing
22 legal advice to a legislator who is a client of TLC, that is
23 protected by attorney-client privilege.

24 **THE COURT:** I wonder on what basis the court in
25 the -- the redistricting court in D.C. said no attorney-client

1 privilege here. Do you know?

2 **MR. CLAY:** They almost completely relied on -- if my
3 memory is serving correctly -- on Chapter 323 of the Texas
4 Government Code, which talks about TLC, and the provision which
5 makes those communications confidential. Of course, the fact
6 that it makes -- that Texas law makes it confidential says
7 nothing about its status under the federal common law. In
8 fact, all that does is prove that one element of the attorney-
9 client privilege under the federal common law is present with
10 respect to at least some communications -- no, all
11 communications between TLC and the legislators. The question
12 becomes, under the facts of a particular communication: Are
13 the other elements of the federal common law there to establish
14 attorney-client privilege?

15 **THE COURT:** All right.

16 **MR. CLAY:** Thank you.

17 **THE COURT:** Anything else from anyone?

18 **MR. ROSENBERG:** Just one thing, your Honor. Your
19 Honor solicited whether any of us would like to file any short
20 legal statement on the issue of individual subpoenas. We've
21 also not had a chance to respond to the State's brief in terms
22 of the protocol. We'd like to consider it, and whatever
23 deadline your Honor sets we would file something by, if we file
24 anything.

25 **THE COURT:** Okay. Because I think that's our

1 preliminary hurdle, is whether this is premature because they
2 haven't been subpoenaed individually. So, there was some
3 briefing on that already. I believe the defendants said they'd
4 like to review what's before the Court to see if they're going
5 to provide anything further?

6 **MR. SCOTT:** Yes, your Honor.

7 **THE COURT:** Okay. So -- what is today? Wednesday.

8 **MR. ROSENBERG:** And we have not responded to what
9 they filed.

10 **THE COURT:** Right. So, how much time do you all need
11 for some briefing on that issue?

12 **MR. ROSENBERG:** Whatever your Honor wants in terms of
13 what works for her schedule.

14 **MR. SCOTT:** May we get seven days --

15 **THE COURT:** Let me see.

16 **MR. SCOTT:** -- not including today?

17 **THE COURT:** Yeah, I'm trying to see where we are.

18 So, within seven days, which will put us mid next week.

19 **MR. SCOTT:** Maybe seven days from tomorrow? Would
20 that be okay with the Court, like next Thursday?

21 **THE COURT:** That's fine.

22 **MR. ROSENBERG:** That's fine. So, simultaneous on --
23 seven days from tomorrow.

24 **THE COURT:** Yes. I think so.

25 **MR. FREEMAN:** If I can just raise very quickly three

1 points. First, in the defendants' initial disclosures they
2 stated that they were in possession of these documents. To
3 state that the United States is now responsible to subpoena
4 documents that they have made a concession regarding, that
5 any -- any --

6 **THE COURT:** I mean --

7 **MR. FREEMAN:** -- and that we are responsible for the
8 delay --

9 **THE COURT:** -- the issue is, I think, what the
10 defendants are saying is, those documents are being requested
11 from nonparties here -- and I know the Government has a
12 different position on that -- and that they should be
13 subpoenaed, in that -- one. And, two, I believe the defendants
14 are also saying that they can't just waive that privilege for
15 the legislators.

16 What else? Just so we can narrow everything out
17 right now so we know what the briefing needs to address.

18 **MR. CLAY:** I think that fairly well sums up the
19 issues that we have, that the Attorney General's office -- the
20 Texas Attorney General's office is not a party to this case,
21 and neither are the legislators. And that's hurdle number one.

22 Obviously, related to that is the fact that whatever
23 documents are in the possession of the Texas Attorney General's
24 office are subject to privilege or privileges which belong to
25 the legislators, and we're not in a position to be able to

1 waive those privileges for them.

2 **MR. FREEMAN:** Your Honor, the State of Texas has
3 asserted that they represent these legislators. That's why we
4 have not been able to reach out to them individually,
5 otherwise, under --

6 **THE COURT:** And is that what you all claim?

7 **MR. SCOTT:** Actually, they've notified us they were
8 going to reach out to these individual legislators earlier in
9 this case. And that was an issue, and we asked that we be
10 contacted before you reach out to anybody.

11 **MR. FREEMAN:** That was to bill opponents that we have
12 reached out to, and you have asserted that you --

13 **MR. SCOTT:** Some of which are on the list.

14 **MR. FREEMAN:** But -- and that is because you are in
15 possession of their documents, of documents on which they are
16 parties to that communication, that they are in a e-mail server
17 in your possession.

18 But with regard to documents at issue that they
19 conceded possession of in their initial disclosures, the issue
20 is not waiver; the issue is whether or not this Court will
21 find -- they have -- they have asserted in their privilege logs
22 the state -- a state legislative privilege. The issue that
23 remains is whether this Court will find that that privilege is
24 overcome. That issue is entirely teed up by their possession
25 of the documents, their assertion of the privilege on behalf of

1 the legislators.

2 **THE COURT:** But they're saying they're not --

3 **MR. SCOTT:** Well --

4 **THE COURT:** Can you even assert that privilege?

5 **MR. SCOTT:** Let's use -- let's use Representative
6 Veasey as an example. He is on the list of 250 representatives
7 they asked us to produce the documents. If we are to believe
8 the United States' position in this case, then it is solely our
9 decision, as the A.G. for the State of Texas, whether we go
10 back to anything and everything we can find in the State of
11 Texas, archives or anywhere else, relating to Representative
12 Veasey and make that sole decision. I don't know whether his
13 counsel would agree to that, but I don't think that's the law.

14 **THE COURT:** Well, I don't think so either.

15 **MR. FREEMAN:** Your Honor --

16 **THE COURT:** Because I thought that's what they said;
17 it's a personal privilege that the -- and each legislator can't
18 raise it for the other one or waive it for the other one.

19 **MR. FREEMAN:** Your Honor, the United States admitted
20 the privilege logs as exhibits to its motion, and the
21 legislators who are named in those privilege logs are, I
22 believe, mostly legislators who are on that list, and I could
23 confirm it if I could see a copy of it; legislators such as
24 Senator Fraser, the senate's sponsor of the bill. He has
25 asserted a legislative privilege in the prior case; I believe

1 that he's on their list of people who've asked for
2 representation in this case; they have the documents; they have
3 asserted the state legislative privilege. Those are documents
4 that are ripe before this Court. Same thing with documents
5 from Representative Harless; same things with documents from
6 Speaker Straus. These are individuals who they have the
7 documents, and this Court can rule that those documents should
8 be turned over.

9 Secondly, with regard to the State's contention that
10 the requests are unduly burdensome, there is a framework for
11 such claims in Rule 26(b)(2). The State did not make those
12 types of documents. They simply said that they were
13 technically incapable, and as the United States has explained,
14 they are simply not.

15 And, finally, the State -- with regard to the e-mails
16 at issue in redistricting, those e-mails are not simply limited
17 to instances of why a house is in one district and not another.
18 The e-mails that the Court relied on were broad, systemic e-
19 mails about the way that the State was going to go about
20 redistricting. Perhaps the one that got the most attention
21 concerned a metric that an individual had devised called
22 "Orvis," (phonetic) which would allow the State to look at an
23 individual district, bring up the Hispanic demographics, but
24 try and grab parts of the district that would have minimal
25 Hispanic turnout, so it would look Hispanic, but never elect a

1 Hispanic representative of choice. Those types of systemic e-
2 mails are equally as likely to be present in a case that does
3 not have to do with redistricting. We can't assert that
4 they're present in this case, because we can't see those e-
5 mails. But this Court should see if those e-mails exist, under
6 *Arlington Heights*, to determine whether or not SB 14 was passed
7 with a discriminatory intent.

8 Thank you.

9 **THE COURT:** Okay. So, we're going to get briefing
10 done by next Thursday on that issue, and then -- I would say we
11 should go ahead and set a status hearing just to make sure we
12 stay on top of this, or maybe you all have a ruling.

13 **(Pause; Court confers with the clerk)**

14 **THE CLERK:** March 24th at 8:30.

15 **THE COURT:** So, in the meantime the State is going to
16 go ahead and send that letter, correct? To --

17 **MR. SCOTT:** And to make sure I have the proper
18 contents, what would the Court ask that we ensure is contained
19 in it?

20 **THE COURT:** I'm trying to figure out -- it sounds
21 like, in reading some of the other matters -- and I didn't -- I
22 didn't get to read them extensively, as I would like to have --
23 but that some of the legislators waived their privilege. So,
24 I'm trying to figure out if they're -- if some of these people
25 are going to waive them, then let's turn over those documents,

1 and I don't need to deal with that.

2 **MR. DUNN:** I'd like to read from the letter that was
3 sent, which I now have, if that's --

4 **THE COURT:** That's fine.

5 **MR. DUNN:** -- acceptable to the Court. And, again,
6 for the record, this is Chad Dunn for the Veasey LULAC clients.

7 But in the third paragraph down, it says, "Second,
8 the legislators" -- this is the letter that the Attorney
9 General, Mr. Scott, sent to legislators. In particular, I'm
10 reading from the one that went to State Senator Wendy Davis.
11 And it says:

12 "Second, the legislative privilege protects the
13 confidential deliberations, negotiations, and
14 communications of state and local lawmakers from
15 disclosure."

16 Then it goes on to say:

17 "This privilege was upheld by the Court on behalf of
18 several state legislators who requested OAG
19 representation in *Texas versus Holder*."

20 Here's the money sentence, in my view:

21 "If you wish to assert your legislative privilege in
22 *Veasey versus Perry*, please send written notification
23 of your assertion to me by e-mail at" -- gives
24 Mr. Scott's e-mail address -- "or via regular mail to
25 P.O. Box" -- "no later than Friday, February 7,

1 2014."

2 **THE COURT:** So, it says: "If you wish to assert your
3 privilege"? Is that --

4 **MR. DUNN:** Yes.

5 **THE COURT:** I think you've done that, then. I wasn't
6 clear as to -- when we discussed it earlier, you said -- I
7 don't remember what you stated, that left me fuzzy as to
8 whether they were clear on if you don't assert it --

9 **MR. SCOTT:** Yes. And I think --

10 **THE COURT:** -- at that point.

11 **MR. SCOTT:** -- the prior was about the issue of: We
12 know the ones that were requested; if you need us to assert it,
13 you need to do it by a date certain. What -- I think the
14 opposite -- I don't know whether that's true, whether you fail
15 to notify us and have that means that you are waiving, from the
16 perspective of the Court, that.

17 **THE COURT:** What -- read it to me again, that -- just
18 that last sentence.

19 **MR. DUNN:**

20 "If you wish to assert your legislative privilege in
21 *Veasey versus Perry*, please send written notification
22 of your assertion to me by e-mail" --

23 **THE COURT:** Uh-huh.

24 **MR. DUNN:** -- "or regular mail no later than February
25 7th."

1 **THE COURT:** So, I'm just going to take that if they
2 didn't respond, they don't wish to assert it, is the way I
3 would read that.

4 **MR. SCOTT:** And would that be from the perspective of
5 scope of that -- a ruling like that, would that be for
6 everything that they ever did from the time that they were in
7 the legislature on anything relating to -- we can't just say HB
8 14 or SB 14, because they've requested -- the plaintiffs have
9 requested material that predates that legislature, as well.
10 So, the scope, I guess, is really, really difficult to ever
11 understand --

12 **THE COURT:** Okay. What's the scope here?

13 **MR. SCOTT:** -- given the breadth and over breadth of
14 the request.

15 **MR. FREEMAN:** Your Honor, the scope relates to prior
16 voter identification legislation. We have only asked for
17 documents related to the 2003, 2005 -- I'm sorry -- it may be
18 2005, 2007, 2009, and then the final bill in 2011, as well as
19 any subsequent legislative action or inaction and the rollout
20 and implementation of the bill.

21 **MR. SCOTT:** It's an enormous period of time, none of
22 which would be simply identified by, quote, "SB 14," because
23 that was not true in those prior legislatures.

24 **MR. CLAY:** Your Honor, if --

25 **MR. FREEMAN:** Your Honor, there are bill numbers in

1 the -- in the -- related to the prior (indiscernible).

2 **MR. CLAY:** Your Honor, one other point is I'm not
3 sure you can take that sentence out of the context of the whole
4 letter, which is also asking those legislators whether they
5 would like to be represented by our office. There could be any
6 number of reasons --

7 **THE COURT:** But, I mean, you specifically say: If
8 you wish to assert that privilege, let me know by X.

9 **MR. CLAY:** Through our office. Through our office,
10 as your representative. I mean, there's any number of reasons
11 why a legislator might not have responded to that, and I think
12 it's -- we're wading into very dangerous territory if we take
13 that to be a waiver.

14 **THE COURT:** Well, then, send another letter and --
15 and make it clear that if they don't let this Court know,
16 through you, that they're going to assert that privilege, then
17 I'm going to assume they're waiving it.

18 **MR. SCOTT:** And would that be over simply the
19 documents that are contained in our capacity as attorney-client
20 that we have in our possession?

21 **THE COURT:** No, no. It --

22 **MR. SCOTT:** Or, again, more expansive?

23 **THE COURT:** It would be -- right. Now, we're going
24 to have to figure out what that scope is, because it sounds
25 like we're not agreed to there, but it wouldn't just be what's

1 in your possession. If they're waiving the privilege, they're
2 waiving their privilege.

3 **MR. FREEMAN:** Your Honor --

4 **MR. CLAY:** And what about if they have other counsel
5 other than the Texas Attorney General's Office?

6 **THE COURT:** They can let us know, or they can let you
7 know. I mean, what --

8 **MR. CLAY:** I just keep going back to the way for
9 them -- the subpoena process was put in place for precisely
10 this issue.

11 **THE COURT:** We're going to research that issue, but
12 we need to get this moving --

13 **MR. CLAY:** Okay.

14 **THE COURT:** -- so we're going the other route, too.

15 **MR. CLAY:** Okay.

16 **THE COURT:** Okay?

17 **MR. FREEMAN:** Your Honor, in the redistricting cases
18 the waiver was for -- was a subject matter waiver related to
19 the 2011 redistricting process. I think that it would be fair
20 to have a subject matter waiver in this case related to
21 photographic voter identification bills and -- and related
22 matters.

23 **MR. SCOTT:** Your Honor, I just want to make sure the
24 record is clear. While we are absolutely agreeing -- I mean,
25 if you tell me to go wash your car, I'm out there tonight.

1 Okay?

2 (Laughter)

3 THE COURT: I might get in trouble for that.

4 MR. SCOTT: I would also make sure that the Court is
5 in agreement that our sending of this letter to these folks
6 does not act in any way as a waiver of any kind of our
7 privilege that we believe is validly out there on the
8 legislative privilege or any other privilege.

9 THE COURT: Right. But if some of them are not going
10 to claim that privilege --

11 MR. SCOTT: Absolutely.

12 THE COURT: -- then let's just get that straight
13 right now --

14 MR. SCOTT: Yes.

15 THE COURT: -- up front, clean it all up. Right?

16 MR. SCOTT: Yes.

17 THE COURT: I mean, that's what I'm trying to do.

18 Okay. Anything else?

19 (No audible response)

20 So, you all are going to do your briefing next week,
21 and then we'll have a status on March 24th at 8:30. I am in
22 trial. I'm supposed to start a trial that Monday, so I won't
23 have a lot of time, but we can certainly hash out some things.

24 MR. DUNN: I do have one other thing.

25 THE COURT: Okay.

1 **MR. DUNN:** On the letter, since it sounds like we're
2 going to send a new one, can the Court give us direction on
3 when the deadline ought to be set in the letter?

4 **THE COURT:** Well, I would think two weeks. When are
5 you going to send it out? What are we, Wednesday? Can you
6 send it out by Friday?

7 **MR. SCOTT:** Yes, ma'am. We'll send it out on Friday.

8 **THE COURT:** Okay. And give them two weeks to
9 respond?

10 **MR. DUNN:** And can the plaintiffs have an opportunity
11 of, say, 24 hours to look at the draft letter before it goes
12 out?

13 **THE COURT:** Why don't -- I just don't want there to
14 be issues on the language later.

15 **MR. DUNN:** That's what we're concerned about.

16 **THE COURT:** So -- do you mind?

17 **MR. SCOTT:** So, get the letter to them by Thursday,
18 sometime before the end of the day, and then we -- that gives
19 them, say, Friday by early morning, 11:00, or noon --

20 **THE COURT:** Okay.

21 **MR. SCOTT:** -- Central Standard Time to get any
22 proposed changes. I guess the question is, be -- might as well
23 envision --

24 **THE COURT:** If there is a --

25 **MR. SCOTT:** -- that there might be a problem?

1 **THE COURT:** If there is a problem, call me Friday
2 afternoon.

3 **MR. SCOTT:** Okay.

4 **THE COURT:** Right? Brandy, are we available?

5 **THE CLERK:** After (indiscernible), your Honor.

6 **THE COURT:** Yeah. Probably late afternoon, but --
7 so, you're going to do a draft of the letter by tomorrow, the
8 defendant is; send it to the plaintiffs; they'll look at it;
9 they'll have by noon on Friday to see if there's any issues or
10 problems; if you all can't come to an agreement -- I have a
11 hearing on a lengthy matter at 1:30, but you can talk to Brandy
12 as to whether you need some time.

13 Okay. What else? And, then, we're set for a hearing
14 on March 24th at 8:30, and at that point, hopefully, we can
15 also discuss the outstanding discovery motion that the
16 defendants were going to respond to that the Government filed
17 regarding some requests for production on the definitions of
18 "you" and "your" and --

19 **MR. SCOTT:** Yes, ma'am.

20 **THE COURT:** -- electronic --

21 **MR. SCOTT:** And we anticipate there's going to be a
22 couple of other motions on some privilege logs that the DOJ has
23 provided --

24 **THE COURT:** Okay.

25 **MR. SCOTT:** -- that -- the (indiscernible).

1 **THE COURT:** Anything else from the plaintiffs?

2 **(No audible response)**

3 Nothing else? You're excused.

4 **(Proceeding was adjourned at 11:16 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Toni Hudson", is positioned above a horizontal line.

March 10, 2014

TONI HUDSON, TRANSCRIBER